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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

MARIA WALTERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Appendix A (court of appeals opinion, filed May 18, 1998)	1a
Appendix B (district court order granting summary judgment, filed Mar. 13, 1996)	48a
Appendix C (district court order granting permanent injunction, filed Oct. 2, 1996)	81a
Appendix D (district court judgment on decision by the court, filed Oct. 2, 1996)	99a
Appendix E (district court order on motion to amend and motion for stay, filed Dec. 11, 1996)	100a
Appendix F (court of appeals order denying rehearing, filed Aug. 5, 1996)	117a
Appendix G (statutory provisions, 8 U.S.C. 1252(g), 1324 (1994 & Supp. II 1996))	119a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36304

MARIA WALTERS; WILLIAM WALTERS; CESAR CORONA-ALVAREZ; ANTONIO ALVAREZ; NINFA DE ADAMES, GUADALUPE ADAMES, HUSBAND AND WIFE; CAMILA GARCIA-CRUZ; OMAR KAYYAM MEZIAB, LESLIE MEZIAB, HUSBAND AND WIFE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DORIS M. MEISSNER, COMMISSIONER OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Argued and submitted: July 14, 1997
Decided: May 18, 1998]

Before: GOODWIN and REINHARDT, Circuit Judges, and KING, Senior District Judge.*

REINHARDT, Circuit Judge:

The Attorney General of the United States and other parts of the U.S. government (collectively, "the government") appeal from the district court's determination that certain administrative procedures employed by the Immigration and Naturalization Service ("INS") violated the constitutional requirements of due process. The government also appeals the district court's certification of the plaintiff class and the court's entry of permanent injunctive relief. We agree with the district court that the nationwide procedures by which the INS obtained waivers in document fraud cases violated the aliens' rights to due process of law. We also agree that certification of plaintiffs as a class under Fed. R. Civ. P. 23(b)(2) was appropriate. And although we modify one of the provisions in the injunction, we uphold its principal terms.

Proceedings in the District Court

The plaintiffs brought suit against the government on behalf of themselves and similarly situated noncitizens, seeking declaratory and injunctive relief on the ground that the administrative procedures used by the INS to obtain final orders under the document fraud provisions of the Immigration and Naturalization Act of 1990 ("INA" or "the Act") violated their rights to procedural due process. Under § 274C of the Act, 8 U.S.C. § 1324c,

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

the INS may issue an unappealable final order against an alien who has been accused of document fraud if the alien does not request a hearing in writing within 60 days of receiving the notice of intent to fine ("the fine notice") and the notice of rights/waiver ("the rights/waiver notice") forms. Such an order renders the alien deportable and permanently excludable. Deportation is automatic, except in narrowly limited circumstances. If the alien signs a statement waiving his rights with respect to the document fraud charges, including his right to a hearing, the INS will immediately issue an unappealable final order assessing a fine and requiring the alien to cease and desist from his wrongful conduct, but the ultimate result that ordinarily will follow soon thereafter will be the issuance of an order of deportation.

In their complaint, the plaintiffs contend that despite the dramatic immigration consequences for those charged with violating the document fraud provisions of the INA, the forms served on aliens in connection with these charges are dense and written in complex, legal language. The plaintiffs allege that on account of the confusing nature of the forms, aliens in document fraud proceedings are not adequately informed of the steps they must take in order to contest the charges brought against them and thus do not learn how to obtain a hearing on them. Moreover, they allege, they do not learn the true consequences of failing to request that hearing. They also challenge the general procedures by which the forms are presented to them. The plaintiffs moved to certify a class of approximately 4,000 aliens who had been or were subject to final orders, and moved for the entry of a preliminary injunction, summary judgment, a permanent injunction, and an order

requiring the INS to reopen each plaintiff's document fraud case and provide hearings if necessary.

In March 1996, Judge Coughenour certified the plaintiffs as a class with the following characteristics:

> All non-citizens who have or will become subject to a final order under § 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Under the district court's order, an individual alien can establish his status as a class member by attesting that he did not understand either his rights in the document fraud proceedings or the consequences of waiving his rights. In the same order, Judge Coughenour ruled on summary judgment that the procedures and forms used by the INS in document fraud cases are unconstitutional because they deny aliens their rights to due process of law. The court also granted permanent injunctive relief; the terms of the injunction were to be decided after the parties submitted proposals to the court.

In October 1996, Judge Coughenour entered final judgment in favor of the plaintiffs and granted a permanent injunction requiring the INS to take a variety of actions to remedy the constitutional violations. According to the terms of the injunction, the INS must: (1) revise the two misleading forms (the fine notice and the rights/waiver notice); (2) send notice to possible class members at their last known addresses, and, through a publicity campaign that must include specific attempts

to contact all class members inside and outside of the country, publicize the opportunity for class members to reopen their document fraud proceedings; (3) refrain from deporting noncitizens on the basis of § 274C final orders that were entered without a hearing until class members have the opportunity to pursue reopening procedures; (4) reopen § 274C proceedings for each class member who was subject to a § 274C final order, unless the government can show that alien received adequate notice; (5) parole or make other arrangements for class members outside the United States to pursue reopened proceedings; and (6) recharge any alien charged with deficient forms who failed to request a hearing but has not yet been subjected to a final order, unless the government can show that the alien received adequate notice.

In its order certifying the class and finding due process violations, the district court did not resolve all of the claims raised by the plaintiffs. However, after the government moved for summary judgment in its favor on the remaining claims,[1] the district court stated in its order for a permanent injunction that "there is no reason to rule on the alternate grounds for that relief represented by the three issues defendants ask the

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[1] The three remaining claims are: (1) the plaintiffs' assertion that they are entitled to translations of the fine notice and the rights/waiver notice in languages other than Spanish and to oral translations of the forms into all other languages; (2) the plaintiffs' assertion that the INS was required to serve the fine notice forms on plaintiffs' attorneys and that the INS is prohibited from obtaining waivers without letting aliens consult with counsel; and (3) the plaintiffs' assertion that INS agents coerced at least some of the plaintiffs into waiving their rights to a hearing on the document fraud charges.

Court to decide." The district court dismissed without prejudice the leftover claims.

The government challenges the district court's factual findings and legal conclusions *in toto*.

DISCUSSION

Although there is no question that the United States has extraordinarily broad powers in the area of immigration and border control, it is also well established that aliens facing deportation from this country are entitled to due process rights under the Fifth Amendment. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976). As the Supreme Court has explained on a number of occasions, "once [an] alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). Thus, the government is not free to deport an alien from the United States unless it has first accorded him the most basic procedural protections—notice and a hearing at a meaningful time and in a meaningful manner. *Id.* at 32-33, 103 S.Ct. 321.[2] The plaintiffs assert that the INS regularly violates these constitu-

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[2] A waiver of either of these basic rights is valid only if the government demonstrates that the alien intentionally relinquished a known right or privilege. *See United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir.1993); *see also Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir.1991) (stating that "[c]onstitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent").

tional precepts in the context of document fraud proceedings.

At the heart of this case is the plaintiffs' allegation that the procedures by which INS agents procured waivers of the right to a hearing in document fraud proceedings were constitutionally deficient because the forms used in connection with these proceedings did not adequately inform aliens of their right to a hearing or of the drastic immigration consequences that would ensue if the alien failed to request a hearing. As a result, the aliens' waivers were not made knowingly and voluntarily. These procedures, the plaintiffs contend, have been employed nationwide by the INS in virtually every case in which the government has charged an alien with committing document fraud.

I. The Forms

An alien who is alleged to have committed civil document fraud in violation of § 274C learns of the charges against him by means of several INS forms that are served upon him. Two forms—the fine notice and the rights/waiver notice—are served simultaneously. Because aliens who commit civil document fraud are subject to immediate deportation, they also receive another form, an Order to Show Cause ("OSC") regarding deportation. The OSC is frequently served at the same time as the initial two forms.

The fine notice, which is written in English, informs the alien of the specific charge against him and states that he will be fined and ordered to cease and desist from the prohibited activity as a consequence of the charge. This form also notifies the alien that he may

request a hearing to contest the charge. With respect to the hearing, the fine notice states:

> If a written request for a hearing is not timely filed, the Service will issue a final and unappealable order directing you to pay a fine in the amount specified in this Notice and to cease and desist from such violation(s).

Notwithstanding the notice's statement that the failure to file a request for a hearing will result in a final order imposing a fine and a cease and desist requirement, the notice does not explain or even mention the severe immigration consequences that will ordinarily result if the alien fails to request a hearing—specifically, the high probability that the alien will be deported immediately. Nor does it advise the alien that document fraud constitutes a deportable offense and that he will not be able to contest the charge at his deportation hearing.

The rights/waiver notice is a very dense form. It is divided roughly into thirds. In the top third, it lists the various rights to which the alien is entitled in the context of document fraud proceedings, such as the right to be represented by an attorney and the right to file a written request for a hearing. Buried in the middle third of the form, just above a line on which the INS official signs his name to indicate personal service, is a statement that an alien who is subject to a final order under § 274C "will be excludable pursuant to Section 212(a)(6)(F) of the Act and deportable pursuant to Section 241(a)(3)(C) of the Act." In the bottom third of the notice, the INS provides a section in which the alien may waive his right to a hearing and admit that he

engaged in document fraud. The acknowledgement reads:

> I acknowledge that I have (read) (had interpreted and explained to me in the _____ language) and understand the contents of this document, a copy of which I have received. I further understand that I waive the right to request a hearing before an administrative law judge and agree to pay the penalty amount, as specified in the Final Order. I understand that this waiver shall result in the entry of a Final Order for a violation of Section 274C of the Act, from which there is no appeal.

The acknowledgement does not state that the alien understands that by waiving his right to a hearing as to the document fraud charges he also waives his right to challenge his deportability and excludability on that account, and he will in most instances be permanently barred from re-entering the country. The acknowledgement only asks the alien to acknowledge that he is agreeing to pay a fine and that an order will be issued "for a violation of Section 274C of the Act." It does *not* ask him to acknowledge that he is consenting to his deportability and that the deportation hearing he will receive will in most instances be rendered meaningless. Further, neither the fine notice nor the rights/waiver notice provides a form the alien can use to request a hearing on the charges of document fraud.

In addition to these two forms, aliens charged with civil document fraud are also served with an OSC regarding deportation. As noted above, the OSC is frequently served simultaneously with the fine notice and the rights/waiver notice. The OSC is five pages long, and, unlike the fine notice and the rights/waiver

notice, which are written in English only, the OSC is written in both English and Spanish. Often, a warrant authorizing the arrest of the alien, also translated into Spanish, is attached to the OSC.

The first page of the OSC notifies the recipient that deportation proceedings are pending against him and informs him of the specific allegations with respect to his deportability. Sometimes the allegations refer to the document fraud, which is the subject of the accompanying documents. Sometimes they charge only illegal entry or some similar offense. OSCs in the second category may then be amended to charge the document fraud directly. The second page explains the purpose of the notice as follows:

> This notice identifies your rights as an alien in deportation proceedings, and your obligations and the conditions with which you must comply in order to protect your eligibility to be considered for certain benefits.

It further explains that *a hearing will be scheduled* "no sooner than 14 days from the date [the alien] was served with [the OSC]" and that *at this hearing*, the alien "will be given the opportunity to admit or deny any or all of the allegations in this Order to Show Cause, and whether [he is] deportable on the charges set forth [in the order]." It does not, however, advise an alien who has been charged in the OSC with document fraud that unless he requests a *separate* hearing on those charges, he will *not* be able to contest them at the deportation hearing, and that he will *not* be able to contest his deportability or excludability at any time thereafter. Nor does it tell him that in order to obtain the separate hearing on the document fraud charges, he

must file a separate written request, unlike in the case of the deportation hearing, which, he is told, he will receive automatically. It also does not advise those aliens who are charged with offenses other than document fraud that the document fraud charges, which were contained in the other forms that were simultaneously served on him, or were served on him during the same general time period, cannot be contested at the deportation hearing. Finally, it does not provide the alien with any form that will enable him to request the separate hearing that is required on the document fraud charges.

On the third page, the OSC identifies the specific provision of the INA under which he is subject to deportation and explains that the INS will mail under separate cover a notice regarding the date of the deportation hearing. The fourth page describes in detail the sequence of events that will follow if the alien fails to appear at the deportation hearing. The fifth and final page contains a Certificate of Translation and Oral Notice, in which the alien may verify that the OSC was read to him in Spanish.

In sum, an alien charged with civil document fraud receives three forms advising him of two hearings. One hearing, he is told—the hearing on the document fraud charges, the consequence for which is stated to be a fine and a cease and desist order—will be held only if the alien submits a written request. The other hearing, the alien is advised—the hearing on the far graver issue whether he will be deported—will be held automatically, without the need for him to do anything. He is also told that at *that* hearing he will be able to respond to the allegations that constitute the basis for the

threatened deportation. None of the forms advises the alien that if he fails to request a *separate* hearing on the document fraud charges, the deportation hearing he receives will ordinarily be meaningless, that he will be found deportable and excludable on the ground of document fraud without any further opportunity to challenge that determination, and that his deportation will in most instances be virtually automatic.

II. Summary Judgment

As a threshold matter, we must determine whether the district court's grant of summary judgment was proper. In reviewing that decision, we view the evidence presented in the light most favorable to the nonmoving party. We look first at the facts upon which the district court relied and examine the government's contention that material facts were in dispute. We then consider the government's argument that the district court's legal analysis is flawed.

A. The Facts

1.

The district court concluded that the plaintiffs were entitled to summary judgment because the INS procedures for securing waivers of a hearing on document fraud charges create an unacceptable risk of confusion likely to result in erroneous deportation. Specifically, the district court found that the following factors caused many aliens to misapprehend the consequences of the failure to seek a hearing on the document fraud charges.

First, the district court found that because the forms are written in complex and legalistic language, they "fail to indicate in clear, simple terms that a document fraud final order leads to immediate deportation with almost no chance of readmission." In reaching its conclusion that the members of the plaintiff class were unable to understand the import of the fine notice and rights/waiver notice forms, the district court relied on statistical evidence to show that noncitizens generally do not understand that when they sign the rights/waiver form, they are waiving their right to contest the document fraud charges. Additionally, the district court relied on specific testimony by class members who testified that when they signed the waivers, they did not fully understand that they were relinquishing their right to be heard on the document fraud charges; rather, they believed that they could still contest the document fraud charges at their deportation hearing.

Further, the district court found that class members who signed waivers did not understand the severe immigration consequences attendant on the document fraud charges. Specifically, they did not understand that by relinquishing their right to a hearing as to the document fraud charges, they were effectively relinquishing their right to contest their deportability or excludability. In its order granting summary judgment, the district court stated that "[m]ost, if not all, of the aliens who testified stated that they did not understand the forms, and did not realize that they faced permanent exclusion." Indeed, the district court observed that the forms are so obscure and confusing with respect to this point that even some of the INS agents who administer them are unable to explain adequately the immigration consequences of a final

order on document fraud charges. According to the district court, the agents' ignorance not only demonstrates that the forms themselves are inadequate, but also shows that the agents are incapable of remedying the insufficiency of the forms by providing an explanation to the aliens.

Next, the district court noted that the impenetrable and confusing nature of the forms was heightened in the specific context in which they were used. Given that most recipients of the forms are noncitizen immigrants whose primary language is one other than English, the court concluded there is very little chance that they, in particular, would be able to plow through the legalistic language in order to figure out what steps to take so as to contest their deportation.

Additionally, the district court determined that the English-only waiver forms, which explain the document fraud hearings, are frequently presented at the same time as the OSCs regarding deportation. Unlike the fine notice and the rights/waiver notice, which are presented in English only, the OSCs are presented in English with a Spanish translation after each line or with a Spanish translation set forth in parallel columns. The simultaneous presentation of these forms is significant because they all refer to integrally related matters. The district court concluded that because the OSCs are written in both English and Spanish but the fine notice and rights/waiver notice forms are not, an alien who receives all of the forms is likely to believe that the OSC is of greater importance than the other two.

Finally, Judge Coughenour concluded that the language of the OSC is likely to give the alien the impression that in order to challenge the document fraud charge he need only appear at the deportation hearing. In other words, the OSC would lead an alien to believe that it is not necessary to take any action with respect to document fraud in order to obtain a deportation hearing at which he can effectively oppose a finding of deportability and excludability. This impression is, the district court concluded, contrary to the actual facts. As Judge Coughenour pointed out, the document fraud charge can *only* be contested at a separate document fraud hearing, and the alien must file a written request in order to obtain such a hearing; if the alien fails to make a request for *that* hearing, a final, unappealable order is entered, thereby rendering him immediately deportable, and by the time the deportation hearing rolls around the question of the alien's deportability and excludability has been resolved against him.[3]

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[3] As the district court pointed out, under limited circumstances the Attorney General has the discretion to waive deportation for certain aliens who have received final orders on document fraud charges. The record reveals that such discretion has rarely been exercised. The district court also took into consideration the new exception provided in § 345 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). That section provides that the Attorney General may grant a discretionary waiver to aliens who have not previously been fined under § 274C and who committed the offense "solely to assist, aid, or support the alien's spouse or child (and no other individual)." 8 U.S.C. § 1227(a)(3)(C)(ii). Judge Coughenour still concluded that the issuance of any final order of document fraud virtually ensures automatic deportation. We would only add that it is not necessary to go that far to reach the result the district court correctly reached here.

2.

The government argues that the district court ignored conflicting factual evidence in determining that the INS forms and procedures violated due process, and that summary judgment was therefore inappropriate. In support of its contention that the district court improperly granted summary judgment, the government identifies several disputed issues of fact, and argues that the district court ignored these factual disputes in finding that the forms do not provide adequate notice. Although we agree with the government that some factual issues are in dispute, we do not find that any of these issues is material to the plaintiffs' due process claims. Significantly, the government does not challenge any of the facts upon which the district court relied in concluding that the document fraud forms and procedures do not provide adequate notice. Because they played no role in the district court's constitutional analysis, the factual issues identified by the government are not material.

For example, the government points out that a factual dispute exists regarding the language abilities of the class members. The government contends that, while the district court stated that it is "uncontestable that most respondents speak primarily or only Spanish," evidence in the record demonstrates that in fact, "[m]any 274C respondents speak English well, have a working knowledge of English, or worked and lived in the United States a significant length of time." In making this argument, the government apparently wants us to attribute to the district court a categorical conclusion that the members of the plaintiff class do not

speak any English. However, we do not read the district court's statement to mean anything more than what it says. That some class members may be able to communicate to a certain extent in English does not contradict the point upon which the district court relied—those who are charged with document fraud are, for the most part, aliens whose primary language is not English. Moreover, we conclude that the documents are so bureaucratic and cumbersome and in some respects so uninformative and in others so misleading that even those aliens with a reasonable command of the English language would not receive adequate notice from them.

We have likewise considered the remaining issues of fact identified by the government as being in dispute and conclude that none of them is of any consequence to the determination that the forms are constitutionally inadequate. We emphasize that summary judgment may be proper even in light of existing factual disputes, as long as none of the facts in dispute is material. Given the essential facts that determine the outcome in this case—the complexity and ineptness of the forms and the fact that they are designed to provide essential information of constitutional significance to persons of foreign birth—we conclude that the district court properly found that no issues of material fact precluded summary judgment.

B. Due Process Analysis

According to the government, the district court's legal conclusions regarding the constitutionality of the INS forms are erroneous, and it advances the following arguments in support of this position: (1) the contents

of the forms adequately apprise the alien of his rights and the direct consequences of waiving those rights, and due process does not require that forms, such as the waiver of rights form, be in any language other than English; (2) in applying *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the district court erred in calculating the various interests at stake and, as a consequence, misapplied the balancing test; and (3) even if there was a constitutional violation, the plaintiffs failed to demonstrate that any prejudice flowed therefrom.

1. Contents/Language of the Forms

Initially, the government contests the district court's decision that the forms fail adequately to inform aliens of their rights and of the consequences of waiving them. Our review of the forms leads us to conclude that the district court properly evaluated them in light of all the relevant circumstances and correctly determined "that a *confluence of factors*" rendered them constitutionally inadequate. Whether or not any one of the factors alone might be insufficient to create a due process violation, the combination of factors—the forms' failure to advise the alien in clear terms of the need to request a separate hearing on the document fraud charges in order to contest deportability on that ground; the forms' failure to explain the drastic immigration consequences that ensue from a final order on the document fraud charges; the fact that the fine notice informs the alien that the penalty for document fraud is simply the imposition of a fine and the issuance of a cease and desist order; the fact that the acknowledgement in the rights/waiver form does not state that a failure to request a hearing will result in a finding of deport-

ability and permanent excludability, and in most instances immediate deportation (although the acknowledgement purports to set forth the consequences of that failure); the legalistic language and confusing references to sections of the INA; the practice of presenting the monolingual fine notice and rights/waiver notice forms simultaneously with the bilingual OSC;[4] the failure to provide translations or explanations of the forms (other than the OSC) to aliens who have difficulty comprehending English; and the statements in the OSC assuring the alien that he will receive a deportation hearing at which he may refute the charges that will serve as the basis for deportation—produces a high likelihood that aliens receiving the forms will be confused and misled.

We reject the government's argument that the document fraud forms satisfy the notice component of due process even if they do not apprise the alien of the drastic consequences regarding deportation.[5] Informing

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[4] We duly note the government's contention that due process does not require the government to provide notice in any language other than English. *See infra* Part II. Because the government elected to provide some information in a language other than English, however, it created the possibility that the partial use of bilingual forms would result in greater confusion than if it had used monolingual forms exclusively. We express no view regarding whether due process ordinarily requires that the type of forms used here be translated into Spanish or any other language. The district court properly dismissed that claim without prejudice.

[5] In its brief, the government maintains that deportation is merely a collateral consequence of an adverse finding in a § 274C proceeding. This contention is without merit—the statute specifically provides that "[a]n alien who is subject to a final order [on document fraud charges] is deportable." 8 U.S.C. § 1251(a)(3)(C)(i). The fact that there may be limited discretionary

an alien that a final order under § 274C will result in a finding of deportability and permanent excludability, and in most instances immediate deportation, is necessary in order to ensure that the alien understands that he *must* request a *separate* hearing on the document fraud charges in order to preserve his rights. Otherwise, the alien has no reason to know that by waiving his opportunity for a document fraud hearing, he is waiving his right to a meaningful deportation hearing. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950) ("The notice must be of such a nature as reasonably to convey the required information."). Here, the alien never learns *how* to take advantage of the deportation procedures because the combined effect of all the forms together is confusion. *See also Perkins v. City of West Covina*, 113 F.3d 1004, 1012 (9th Cir. 1997) (explaining what kind of notice is constitutionally sufficient).

In fact, the forms the government serves on the plaintiffs are not only confusing, they are affirmatively misleading. The fine notice specifically advises the alien that a final order on the document fraud charges will direct him to pay a fine and to cease and desist from his wrongful conduct. It says nothing about the fact that a final order will result in a finding of deportability and excludability, or the likelihood that it will result in the alien's immediate deportation. The acknowledgement in the rights/waiver form exacerbates the problem by once again listing the penalties for the offense but failing to mention the drastic immigration consequences. Moreover, the OSC, which is frequently

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relief from this otherwise inexorable result does not transform it into a mere collateral consequence.

served on the alien simultaneously with the other two document fraud forms compounds the due process violation. Understandably, the OSC, which is the only form that is bilingual, is the most worrisome to the alien because it threatens deportation. As a consequence, many aliens are likely to pay more attention to the OSC than to any other form. Although the OSC specifically promises the alien an opportunity to be heard as to whether or not he should be deported, in document fraud cases such a promise is frequently illusory; for in the meantime, the alien will often have unknowingly waived his only opportunity for a hearing on charges that will render him both deportable and excludable. Yet nowhere does the OSC even hint at the need for the alien to request a separate hearing. To the contrary, it expressly informs him that a hearing at which he can contest the charges on which deportation is threatened will be scheduled automatically. By making that assurance, the government lulls the alien into a false sense of procedural security, whether or not document fraud ultimately serves as the basis for the deportation order; for, at the very least, the alien will without further recourse be held to be deportable and permanently excludable.

2. Mathews v. Eldridge

The government maintains that the district court erred in evaluating the relevant interests under the calculus established in *Mathews v. Eldridge*. As the *Mathews* balancing test makes clear, whether a particular procedure is sufficient to satisfy due process depends on the circumstances. Thus,

> [i]n evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34, 96 S.Ct. 893 (citing *Mathews*, 424 U.S. at 319, 96 S. Ct. 893). We agree with the district court that the relevant factors weigh in favor of altering the document fraud forms.

It is clear that the plaintiffs' interests in this case are significant. *See Plasencia*, 459 U.S. at 34, 103 S. Ct. 321 (noting that the alien's interest in deportation proceedings "is, without question, a weighty one" because "[s]he stands to lose the right 'to stay and live and work in this land of freedom.'") (quoting *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945)). The government's interests in the administration of its immigration laws and in preventing document fraud are likewise considerable. *Id.* Striking the proper balance between these interests can be achieved by adopting procedures that reduce the risk of erroneous deprivation without imposing an undue burden on the government.

Requiring the government to alter slightly its procedures in document fraud proceedings will achieve the desired effect—additional safeguards—without visiting upon it any inordinate hardship. Specifically, it is possible to reduce the risk of erroneous deprivation (*i.e.*, erroneous deportation) by ensuring that aliens

facing charges of document fraud are adequately notified that they *must* request a separate hearing to contest those charges and that their failure to do so will ordinarily foreclose their ability to challenge their status as deportable aliens.[6] Providing constitutionally adequate notice requires only minor changes in the content of the forms themselves and equally slight adaptations in the INS's method of presenting the forms. Requiring the INS to ensure that there are no significant inconsistencies in the written language of forms that affect whether or not an alien will be rendered deportable and permanently excludable, and requiring minor modifications to the written content of the forms will not be unduly burdensome, particularly in light of the benefits of such safeguards.

3. Prejudice

The government additionally challenges the district court's finding that certain members of the plaintiff class suffered prejudice as a result of the constitutionally deficient proceedings.[7] We question whether the plaintiffs in this case must demonstrate prejudice in

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[6] The government maintains that in calculating the burden on the government of additional safeguards, the court should consider the costs of making the new requirements retroactive. In taking this position, the government has confused two distinct analyses. The question whether a certain procedure violates an alien's right to due process is separate from the question regarding the proper remedy once a due process violation has already been found.

[7] In some respects, the prejudice issue overlaps with the question whether the plaintiffs suffered actual injury to justify injunctive relief. To the extent the issues are the same, we address some of the government's contentions regarding the actual injury inquiry in our discussion of the prejudice requirement.

order to prevail on their due process claims.[8] However, because both parties assume that they must do so, we do not consider the question here. Instead, we assume *arguendo* that prejudice is required and conclude that the district court properly found that the plaintiffs made the required showing.

When it is necessary to demonstrate prejudice as a result of a constitutional violation, the alien must show that the inadequate procedures occurred "in a manner so as potentially to affect the outcome of the proceedings." *Hartooni v. INS*, 21 F.3d 336, 340 (9th Cir. 1994); *see also United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996) (holding that in order to show prejudice, an alien need not prove that he would not have been deported, just that he had "plausible grounds for relief"). Ordinarily, there must be plausible scenarios in which the outcome of the proceedings would have been different, absent the constitutional violation. *See United States v. Leon-Leon*, 35 F.3d 1428, 1430 (9th Cir. 1994).

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[8] Neither party cites to a case in which an alien who received constitutionally inadequate notice and was therefore deprived of a hearing was required to demonstrate prejudice in order to obtain relief. Instead, each of the cases to which they cite involved alleged due process violations that occurred *during the alien's hearing. See, e.g., United States v. Alvarado-Delgado*, 98 F.3d 492, 493-94 (9th Cir. 1996); *Hartooni v. INS*, 21 F.3d 336 (9th Cir. 1994). In *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992) (en banc), we specifically recognized that "there may well be times when the administrative proceedings were so flawed that effective judicial review will be foreclosed." *Id.* at 595. Here, the plaintiffs did not receive *any* hearing, even a procedurally defective one. Consequently, no evidentiary record has been developed for a court to review.

Here, the district court determined that at least two class plaintiffs had demonstrated that the lack of adequate notice as to their document fraud proceedings potentially affected the outcome of their document fraud proceedings. In the cases of Ninfa Guerrero de Adames and Antonio Santana-Alvarez, the district court found that each had a viable legal defense to the charges that had been brought against them. With respect to Adames, the district court found that she could have made a persuasive argument that the document fraud charges, as applied to her, violated the prohibition against ex post facto laws. In Santana-Alvarez's case, the district court found that he had a strong legal argument that his conduct did not constitute a violation of the document fraud laws. There is no evidence to suggest that these findings are erroneous.[9] The district court determined that if Adames and Santana-Alvarez had not waived their right to a hearing, they might have been able to defend against the charges successfully. Accordingly, the district court concluded that the lack of notice regarding the right to a hearing potentially affected the outcome of the proceedings.

We agree with the district court that Adames and Santana-Alvarez are not precluded from showing prejudice simply because they admitted, while testifying under grants of immunity, that they had used fraudu-

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[9] With respect to Santana-Alvarez, the government attempts to undermine the district court's finding by arguing that the scenario urged by Santana-Alvarez is speculative, as well as by posing alternative scenarios in which he would have been convicted of document fraud. Demonstrating that possible outcomes exist other than the outcome proffered by Santana-Alvarez does not, however, refute the district court's finding of prejudice.

lent immigration documents. It is sufficient for purposes of showing prejudice that the plaintiffs have demonstrated *plausible* grounds for relief. The potential legal defenses identified by the district court satisfy this standard.

III. Class Certification

Rule 23(a) provides that a court should certify a class only if the following prerequisites are met: (1) the class is too numerous, making joinder of the parties impracticable; (2) common questions of law or fact exist among the class members; (3) the claims of the class representatives are typical of the claims of the class; and (4) the class representatives will adequately represent the interest of the class. In addition to satisfying the mandatory prerequisites in Rule 23(a), the potential class members must also demonstrate that they meet at least one of the alternative requirements under Rule 23(b). In this case, the government disputes the existence of two of these requirements—commonality and adequacy of representation. Additionally, the government challenges the district court's certification of the class under Rule 23(b)(2).

A. Commonality

Requiring there to be common questions of law or fact prior to certifying a class serves chiefly two purposes: (1) ensuring that absentee members are fairly and adequately represented; and (2) ensuring practical and efficient case management. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982). In this case, each class member raises the same constitutional question:

whether the nationwide procedures used by INS in document fraud proceedings sufficiently apprise aliens of their constitutional right to a hearing, thereby satisfying the notice component of due process.

The government maintains that the commonality requirement is lacking because the actual experiences of the class members are not sufficiently similar. Some individual INS agents and branch offices, for example, have consistently disregarded the Agency's official policy regarding the use of forms in § 274C proceedings and have instituted supplemental explanations of the potential immigration consequences. Therefore, some aliens who were subject to document fraud charges may have received adequate notice in spite of the constitutionally deficient official procedures.

To support its contention that the class members' claims lack commonality, the government points to terms of the injunction that provide for individualized proceedings. Specifically, it relies on the portions of the injunction providing the government with the opportunity to demonstrate that an individual class member "received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective." According to the government, these proceedings demonstrate that there is no common factual or legal basis for the class claims; if commonality existed, there would be no need for such individualized procedures.

We think the government misses the point. There is nothing wrong with the district court's presumption that the INS actually employed its constitutionally deficient policies and procedures. The government

made no showing in the district court that its procedures were modified by more than just a few agents and branch offices. Thus, it is reasonable to presume that class members involved in document fraud proceedings did not receive due process because of the inadequate forms. Moreover, as the district court observed, it would be "a twisted result" to permit an administrative agency to avoid nationwide litigation that challenges the constitutionality of its general practices simply by pointing to minor variations in procedure among branch offices and individual INS agents, particularly because the variations were designed to avoid the precise constitutional inadequacies identified by the plaintiffs in this action.

The government further argues that commonality is nonexistent on account of factual distinctions in the class members' underlying claims. Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification. What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice. *See Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (noting that the need for subsequent individual proceedings, even complex ones, "does not supply a basis for concluding that [the named plaintiff] has not met the commonality requirement").

B. Adequacy of Representation

Requiring the claims of the class representatives to be adequately representative of the class as a whole ensures that the interests of absent class members are

adequately protected. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S. Ct. 115, 85 L.Ed. 22 (1940). Whether the class representatives satisfy the adequacy requirement depends on "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) (quoting *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992)). Here, the district court specifically found that the attorneys for the class representatives were well qualified and that the class representatives themselves were adequate because they were not antagonistic to the interests of the class and were "interested and involved in obtaining relief."

In challenging the adequacy of the class representatives, the government primarily relies on the fact that some of the named plaintiffs have admitted under grants of immunity that they committed document fraud. According to the government, these admissions preclude the possibility that these representative class members would have prevailed at a hearing on their document fraud charges, and because some of the class representatives cannot demonstrate prejudice—which, as we noted above, the parties assume to be a prerequisite to a finding of a due process violation—the class representatives are hindered in their ability to represent the class before the district court.

We find no merit in the government's position. Once again, the government erroneously emphasizes factual differences in the merits of the underlying document fraud charges. Such differences have no bearing on the class representatives' abilities to pursue the class

claims vigorously and represent the interests of the absentee class members. Moreover, we note that the government's argument is particularly weak in light of the fact that the class representatives have been so successful in their efforts to obtain relief for the entire class.

C. Rule 23(b)(2) Certification

Related to the commonality issue is the government's challenge to the district court's finding that the class was properly certified pursuant to Rule 23(b)(2). Certification under Rule 23(b)(2) is appropriate in cases in which

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Here, the district court found certification proper because the plaintiffs claimed that the INS's practices in document fraud proceedings were violative of due process. The forms and procedures in question were used by the INS in document fraud cases on a nationwide basis. Further, the plaintiffs sought injunctive, not monetary relief.

With respect to certification under Rule 23(b)(2), the government's primary objection appears to be that certifying this class does not further the purposes of Rule 23. Again, the government points to the individual proceedings that will result from the district court's injunction as evidence that judicial efficiency will actually be undermined by the class action. While

the government correctly observes that numerous individual administrative proceedings may flow from the district court's decision, it fails to acknowledge that the district court's decision eliminates the need for individual litigation regarding the constitutionality of INS's official forms and procedures. Absent a class action decision, individual aliens across the country could file complaints against the INS in federal court, each of them raising precisely the same legal challenge to the constitutionality of the § 274C forms. Contrary to the government's assertion, therefore, class certification in this case is entirely proper in light of the general purposes of Rule 23, avoiding duplicative litigation.

We note that with respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1775 (2d ed. 1986) ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (emphasizing that although "the claims of individual class members may differ factually," certification under Rule 23(b)(2) is a proper vehicle for challenging "a common policy").

Moreover, the claims raised by the plaintiffs in this action are precisely the sorts of claims that Rule 23(b)(2) was designed to facilitate. As the Advisory Committee Notes explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions.

IV. The Injunction

According to the government, even if we uphold the district court's rulings with respect to the constitutional claims and class certification, we should nonetheless find that the district court erred in granting permanent injunctive relief. A district court's decision to grant a permanent injunction involves factual, legal, and discretionary components. Therefore, we evaluate a decision to grant such relief under several different standards of review. We review any legal conclusions de novo. *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986). A district court's factual findings are entitled to deference unless they are clearly erroneous. *Id.* Finally, we review the scope of injunctive relief for abuse of discretion.[10] *Id.*

Injunctive relief is appropriate in cases involving challenges to government policies that result in a pattern of constitutional violations. *See Allee v.*

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[10] While the government urges us to scrutinize the injunction in this case more closely than we ordinarily would, citing *Toussaint*, we see no reason to do so. The court in *Toussaint* adopted a somewhat novel standard of review because the nature of the relief, a structural injunction in the context of state prison conditions litigation, called for more exacting review. *Id.* at 1087. We are not, however, reviewing a structural injunction in this case. Nor are we reviewing an injunction involving a state agency or official. *See Barnes v. Healy*, 980 F.2d 572, 576 (9th Cir. 1992). Accordingly, we will apply the usual standards of review.

Medrano, 416 U.S. 802, 815, 94 S. Ct. 2191, 40 L.Ed.2d 566 (1974) (noting that a permanent injunction is proper when there is a persistent pattern of government misconduct); *see also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (upholding permanent injunctive relief "based on findings that the INS engaged in a persistent pattern of misconduct violating aliens' rights"). To qualify for injunctive relief, the class members must demonstrate that they will sustain irreparable injury and that remedies at law are inadequate. *Id.* In order to meet this standard,

> the plaintiffs must establish actual success on the merits, and that the balance of equities favors injunctive relief. That is, the plaintiff seeking an injunction must prove the plaintiff's own case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which the plaintiff bases the right to and necessity for injunctive relief.

Id. (citations omitted).

The government asserts that the class was not entitled to permanent injunctive relief because its members failed to show 1) actual success on the merits, 2) the inadequacy of legal remedies, irreparable injury, and 3) that the injunction was warranted by a balance of the equities. Additionally, the government maintains that the injunction, even if warranted under the law, was overly broad and exceeded the scope of the violation.

Because we have already determined that the district court properly decided that the INS forms used in document fraud proceedings were constitutionally de-

ficient, we have necessarily resolved the question whether the plaintiffs have demonstrated actual success. We examine the government's remaining contentions in turn.

A. Adequacy of Legal Remedies

Injunctive relief is proper only if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries. *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). As to this issue, the government's only real complaint is that the district court failed to address the question whether legal remedies are adequate and the plaintiffs failed to present any evidence to demonstrate the need for injunctive, as opposed to legal, relief. However, we think it is evident that there are no legal remedies available that would adequately compensate the class members in this action. There is no way to calculate the value of such a constitutional deprivation or the damages that result from erroneous deportation. Accordingly, the class members in this case are entitled to equitable relief. *See American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1071 (9th Cir. 1995).

B. Irreparable Injury

Next, the government challenges the district court's determination that the plaintiffs established that they would suffer irreparable injury as a consequence of the INS's constitutionally defective procedures. Specifically, the government contends that because the plaintiffs could not demonstrate prejudice, they were unable to establish actual injury. However, again assuming arguendo that prejudice is required, in light

of our determination that the plaintiffs made a showing of prejudice in connection with the due process violation, we find this argument lacks merit.

Moreover, the class includes not only aliens who have already been deported without a hearing, but also aliens who may in the future be deported without a hearing. Thus, the irreparable injury analysis does not require precisely the same inquiry as the prejudice issue. To the extent that the injunction requires the INS to modify its forms and procedures, such equitable relief is warranted by the likelihood of erroneous deprivation in the future. *See Associated Gen'l Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (the deprivation of a constitutional right alone may constitute irreparable injury).

C. Scope

Once a class has been certified and a constitutional violation has been ascertained, the district court retains broad discretion in fashioning a remedy. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). We review the terms of the district court's injunction for abuse of discretion. *Securities & Exch. Comm'n v. Interlink Data Network*, 77 F.3d 1201, 1204 (9th Cir. 1996). Here, the injunction serves a narrow purpose and is carefully tailored to achieve that goal. The order is designed to allow the members of the class to reopen their document fraud and deportation proceedings, thereby remedying the lack of adequate notice.

At the outset of its attack on the terms of the injunction, the government objects to the district court's issuing an injunction that provides classwide relief. Citing *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996), the government maintains that the systemwide relief mandated by the injunction is unwarranted because the plaintiffs only demonstrated that the constitutional violation prejudiced a few individuals. In *Lewis*, the Supreme Court reversed as overly broad an injunction that essentially called for an overhaul of law libraries in the Arizona prison system pursuant to *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L.Ed.2d 72 (1977). Because there were only two instances in which prisoners were hindered from pursuing their legal claims due to the inadequacy of the prison law libraries, the Supreme Court held that systemwide relief was inappropriate.

In *Lewis*, the constitutional violation was not the violation of the right to adequate law libraries in prisons, but was instead the deprivation of the right of meaningful access to the courts. There was no showing that more than two prisoners suffered deprivation of that constitutional right and thus there was no showing of the need for systemwide relief. By contrast, the constitutional violation in this case is the inadequate notice itself. Thus, once the district court determined that the constitutionally insufficient forms and procedures were employed by the INS on a *systemwide* basis, the court had also determined systemwide injury. Every alien who received the fine notice and the rights/waiver notice forms suffered an injury because he did not receive the notice to which he was constitutionally entitled. Moreover, the lack of notice directly resulted in the failure of the class members to obtain

constitutionally required hearings—a further constitutional injury.

To be sure, at least some aliens who faced document fraud charges were given adequate notice because a few INS offices employed different procedures; such aliens, however, are the exception rather than the rule. As we have already noted, it is uncontested that the constitutionally deficient forms were in widespread use across the country. Furthermore, there is no evidence to suggest that more than a handful of agents and one or two branch offices adopted procedures that attempted to remedy the inadequacy of the forms. Given the extent of the constitutional violation, the district court acted within its discretion in ordering systemwide relief. *Cf. Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) ("Specific findings of a persistent pattern of misconduct supported by a fully defined record can support broad injunctive relief.").

D. Specific Terms

In addition to making a broadside challenge to the scope of the injunction, the government also objects to several of the order's specific terms. In particular, the government contends that the district court abused its discretion in (1) ordering an extensive publicity campaign; (2) requiring it to parole or make other arrangements for class members to contest their deportation; and (3) temporarily enjoining the deportation of class members. We consider separately the appropriateness of each provision that the government challenges, although we recognize that the individual elements are

intended to work together in order to remedy the demonstrated constitutional violations.

1. Publicity Campaign

In order to notify potential class members[11] of the judgment in their favor, the district court's injunction requires the INS to implement a thorough notice and publicity campaign. Specifically, the injunction calls on the INS to 1) send notice[12] to class members, if the INS is in possession of their last known addresses; 2) issue a newswire press release to news organizations in Central and South America; 3) distribute notice to the nonprofit organizations that regularly assist immigrants; 4) distribute notice to "appropriate international organizations and community outreach networks"; and 5) publish the notice in the Federal Register. Because the INS will have difficulty in effecting personal service on all class members, we think the district court's decision to order notice via press release is sound.

The government's principal objection to the publicity campaign is that the district court's order will have some absurd results. For example, the injunction re-

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[11] Class members are those "individuals who received section 274C final orders without a hearing based on the notice forms that the [district court] found to be constitutionally deficient."

[12] The district court also specified the form and content of the notice. Essentially, the notice, which is to be written in English and Spanish, must explain the details of the judgment and its consequences. In addition, the notice must provide a standardized form, which the recipient can sign and return to the INS to advise the agency that he wishes to have his document fraud proceedings reopened.

quires the INS to send the English/Spanish notice to some international organizations that service immigrant populations that speak a language other than Spanish. We think this objection lacks merit. Given that Spanish is the primary language of many aliens who have been subject to final orders with respect to charges of document fraud, we think that this requirement increases the likelihood that class members will learn of the district court's ruling. Moreover, requiring bilingual notice imposes little, if any, additional burden on the government. Any adverse effect of such notice would be suffered by the non-English, non-Spanish speaking aliens who receive it, not by the government. In any event, we do not see how it does any harm to send a bilingual notice instead of a monolingual notice to a recipient who speaks neither language. Moreover, the government is free to send the notice in additional languages as well, where it deems such action to be appropriate.

2. Parole

Permitting the class members to reopen their proceedings is necessary in order to provide a suitable remedy for the INS's failure to give adequate notice. However, allowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied. Accordingly, the district court's injunction requires the INS to parole class members into the United States, or make other arrangements so that they may attend their hearings.[13] The government contends that the district

[13] Multiple hearings may be warranted because under the terms of the injunction, the government has the opportunity to

court exceeded its authority in requiring the INS to grant parole to these individuals, as a matter both of recent statutory developments and of circuit precedent.

In determining that parole was a permissible component of an effective remedy in this case, the district court relied on language in 8 U.S.C. § 1182(d)(5). The government points out, however, that this particular provision of the INA has recently been amended by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). Whereas the law formerly permitted the Attorney General to parole an alien into the United States "for emergent reasons or for reasons deemed strictly in the public interest," it now permits her to do so "only on a case-by-case basis for urgent

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show that the alien in fact received adequate notice, notwithstanding the deficient forms. Assuming that the INS makes every available challenge, the likely progression of an alien's efforts to reopen his proceedings is as follows: first, the alien signs the form attached to the class notice, attesting that he received a final order under § 274C and that he did not request a hearing on the document fraud charges because he received inadequate notice; 2) the INS challenges the alien's claim of inadequate notice in front of an administrative law judge ("ALJ"); 3) if the ALJ agrees with the INS, the alien may appeal to the district court; 4) if the district court agrees with the ALJ, the § 274C final order will be upheld; 5) if either the ALJ or the district court finds that the alien received inadequate notice, the alien's § 274C proceedings will be reopened.

Once an alien's § 274C proceedings are reopened, the INS can recharge the alien using the new, court-approved forms, and the alien can request a hearing on the charges. If the INS opts not to recharge the alien, the final order will be vacated, and the INS will be required, in turn, to reopen the alien's deportation proceedings (assuming that the deportation order was in fact based on the document fraud order).

humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5). Under the new statute, argues the government, classwide parole is not available.

Assuming *arguendo* that the provisions governing the Attorney General's parole power impose limits on the federal courts' ability to remedy constitutional violations, an assumption we are not at all certain is correct, we do not agree that the change in the statutory language has any effect on the validity of the parole provision of the injunction. Although the district court's injunction pertains to the entire class, the parole provisions apply only to certain of those members who have already been deported; further, they are to be implemented by the Attorney General on an individual basis. Specifically, the injunction provides that the government must parole "an alien" who is entitled to reopen his document fraud proceedings; as we noted above, not all class members—not even all those who have been deported—will be entitled to reopen their proceedings. Rather, in order to be entitled to a hearing, an alien must first attest that he *in fact* received inadequate notice. Then, if and when a hearing is scheduled in his case, an alien who has been deported will be allowed on an individual basis to enter the country in order to attend his hearing. Thus, parole will be ordered by the Attorney General only on a case-by-case basis. Further, we note that parole for the purpose of remedying a constitutional violation clearly works a "significant public benefit."

In determining that granting parole was a necessary and permissible component of an effective remedy in this case, the district court also relied on our decision in *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). In

Mendez, we ordered the government to admit into the United States an alien who had been deported without first receiving due process of law. Parole was required in order to permit the alien "to pursue any administrative and judicial remedies to which he is lawfully entitled." *Mendez*, 563 F.2d at 959. In its effort to persuade us that *Mendez* does not support the district court's order in this case, the government seizes on an inconsequential distinction: "Mendez was not paroled to '*attend* reopened deportation proceedings' but to '*pursue* administrative and judicial remedies.'" This is simply a distinction without a difference. In both instances, the parole power is invoked in order to permit an alien to take advantage of procedures to which he is entitled.

We likewise disagree with the government's contention that the parole requirement is unduly burdensome. Without a provision requiring the government to admit individual class members into the United States so that they may attend the hearings to which they are entitled, the district court's injunction would be virtually meaningless. Finally, the district court's injunction does not *require* the government to parole individual class members into the country; instead it leaves the government with the option of establishing other procedures to achieve the same result.[14]

Because we find that requiring the INS to permit the plaintiffs to attend hearings at which their rights will be adjudicated does not violate IIRIRA and does not

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[14] Specifically, the injunction provides that "the INS must parole the alien or make other arrangements to allow the alien to attend" a hearing.

impose an undue burden on the government, we uphold the portion of the injunction that authorizes such relief.

3. Enjoining Deportation

Although the government does not contend that the district court lacked jurisdiction to hear the merits of the plaintiffs' claims, it nevertheless argues that the injunction's prohibition against the future deportation of aliens who received inadequate notice is invalid under IIRIRA. With IIRIRA, Congress provided that

> [e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). On the basis of this jurisdiction-limiting statute, the government contends that the district court did not have jurisdiction to order any relief that interferes with its attempt to execute deportation orders against the class members. We reject this contention.

As we noted above, the government does not assert that the district court was without jurisdiction to hear the claims brought by the plaintiffs, nor could it. By its terms, the statutory provision relied upon by the government does not prevent the district court from exercising jurisdiction over the plaintiffs' due process claims. Those claims do not arise from a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders

against any alien," but instead constitute "general collateral challenges to unconstitutional practices and policies used by the agency."[15] *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492, 111 S. Ct. 888, 112 L.Ed.2d 1005 (1991).

Further, this is not a case in which the plaintiffs have asserted a constitutional challenge in order to conceal the true nature of their claims. *See Catholic Soc. Servs., Inc. v. Reno*, 134 F.3d 921, 927 (9th Cir. 1997). Their objective was not to obtain judicial review of the merits of their INS proceedings, but rather to enforce their constitutional rights to due process in the context of those proceedings. They have not raised a constitutional challenge to any of the substantive factors used by the government in determining whether to charge someone with document fraud, nor have they made any allegations as to the merits of the decision to execute removal orders against them, except to the extent necessary to substantiate their due process claims. Although the constitutional violations ultimately may have led to the plaintiffs' erroneous deportation, the re-

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[15] In some significant respects, the jurisdictional issue we consider here is similar to jurisdictional issues that have arisen in the context of social security cases. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975). In those cases, the Supreme Court carefully drew a distinction between litigants who sought review of the agency's decision to award or deny benefits and litigants who raised colorable constitutional challenges to the procedures employed by the agency. *See Califano v. Sanders*, 430 U.S. 99, 108-09, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977); *see also Kicking Woman v. Hodel*, 878 F.2d 1203, 1206-07 (9th Cir. 1989) (drawing the same distinction in the context of a decision by the Department of the Interior's Board of Indian Appeals).

sulting removal orders were simply a consequence of the violations, not the basis of the claims. Moreover, if the plaintiffs prevail on their claims, they will not be entitled to any substantive benefits; rather, they will only be entitled to reopen their proceedings. *See McNary*, 498 U.S. at 495, 111 S. Ct. 888.

We are also mindful that "where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1372 (9th Cir. 1997). And we reiterate that any legislation that completely immunizes an agency's practices and procedures from due process challenges "would raise difficult constitutional issues." *Catholic Soc. Servs.*, 134 F.3d at 927; *see also Califano v. Sanders*, 430 U.S. 99, 108, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977) (noting that "when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence") (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975)). In light of these concerns, we conclude that the statute does not impose a jurisdictional bar to the plaintiffs' claims or the relief the district court awarded.

Because the district court clearly had jurisdiction to hear the claims regarding constitutional violations in the context of the document fraud proceedings, it had jurisdiction to order adequate remedial measures, including injunctive provisions that ensure that the effects of the violation do not continue.

4. Other Provisions

In addition to these provisions, which the government challenges as unduly burdensome, the district court also ordered the INS to take the following measures: 1) the INS must cease using the forms that were found to be constitutionally inadequate; 2) the INS cannot use forms "that are not written in English and Spanish, or that do not simply and plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them"; and 3) if the INS serves a deportation-related OSC simultaneously with the § 274C forms, all the forms must "simply and plainly communicate in English and Spanish the importance and separate nature of the section 274C proceedings." The district court also established monitoring mechanisms in the injunction, such as a procedure that permits both the court and the plaintiffs to review the INS's modified forms.

While we think that the district court's requirements regarding the content of the forms are generally well-founded, we are reluctant to insist that the relevant forms be prepared in both English and Spanish. We recognize that many of the recipients primarily speak a language other than English, and we agree with the district court that multilingual forms would be an effective means of ensuring adequate notice. However, we prefer not to impose such an obligation on the government. Instead, we think it more appropriate to leave it to the INS to determine in the first instance how best to revise its forms so as to "simply and plainly communicate" the necessary information and advice to the aliens against whom it brings charges. In doing so,

the INS should bear in mind that among the flaws the district court properly identified in the agency's procedures was the furnishing to aliens of related documents that were inconsistent as to the language or languages in which they were written. That inconsistency contributed substantially to the finding of a due process violation.

CONCLUSION

For the reasons stated above, we uphold the district court's grant of summary judgment and, with one minor exception, the terms of its injunction. We remand so that the district court may modify its order granting permanent injunctive relief in accordance with this opinion and may take whatever other action it may deem appropriate.

AFFIRMED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C94-1204C

MARIA WALTERS, ET AL., PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., DEFENDANTS

March 13, 1996

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, MOTION FOR CLASS CERTIFICATION, AND RELATED MOTIONS

This matter is before the Court on the parties' cross-motions for summary judgment, plaintiffs' motion for class certification, plaintiffs' motion for a preliminary injunction, and various discovery motions. Having reviewed the pleadings, memoranda, exhibits and other documents on file, and having heard oral argument, the Court now finds and concludes as follows:

I. BACKGROUND

In 1990, Congress enacted legislation designed to curb the use of fraudulent documents by illegal immigrants. Although employer sanctions had been in place since 1983, Congress found that these sanctions were not effective in reducing illegal immigration. The new law was aimed directly at illegal aliens who use fake social security cards, birth certificates, driver's licenses, and the like to obtain employment in the United States. The law not only leads to civil monetary penalties, it effects the deportation and permanent exclusion of aliens, even those who would be entitled to stay in the United States with their families under other provisions of the immigration laws.

This is an action for declaratory and injunctive relief brought by several non-citizens on behalf of a similarly situated class of aliens subject to final orders pursuant to Section 274C of the Immigration and Naturalization Act of 1990, 8 U.S.C. § 1324c. An alien who is the subject of a final order under § 274C is permanently excludable and deportable, subject to perhaps a few small exceptions. The plaintiffs allege that the INS' notification procedures and procedures for obtaining waivers of rights under the statute are unconstitutional. Plaintiffs seek class certification, declaratory judgment, and injunctive relief. They also seek an order requiring INS to reopen their § 274C cases and give them hearings.

There are several motions pending. Plaintiffs move for the entry of a preliminary injunction. Plaintiffs also move for certification of a class of a few thousand aliens subject to final orders under § 274C. Both parties move for summary judgment, and plaintiffs seek the entry of a final injunction. There are also several discovery

motions. Defendants move for a protective order barring certain depositions. Plaintiffs move to compel production of documents and witnesses. Finally, defendants move to strike certain declarations and move for permission to file certain exhibits late.

II. FACTUAL AND LEGAL BACKGROUND

Section 274C of the Immigration Act of 1990, 8 U.S.C. § 1324c, makes it unlawful to possess, make, or use false documents for the purpose of satisfying immigration requirements. 8 U.S.C. § 1324c(a). The penalties for violating the statute range from $250 to $5,000 for each document so used. 8 U.S.C. § 1324c(d)(3). Further, the entry of a final order renders an alien deportable and permanently excludable. 8 U.S.C. § 1251(a)(3)(C). Deportation is automatic unless the alien qualifies for one of several narrow exceptions, such as voluntary departure under § 1254(e). After deportation, there are few, if any, waivers to inadmissibility available to the alien.

Final orders under § 274C may be entered without a hearing only if the respondent is provided with notice and an opportunity of not less than 30 days to request a hearing. 8 U.S.C. § 1324c(d)(2). If the alien does not request a hearing, the final order is not appealable.

Under the applicable INS regulations, an alien served with notice of charges under § 274C has 60 days to request a hearing. Yet, despite the severe immigration consequences of the entry of a final order without a hearing, many aliens either do not request hearings or affirmatively waive their rights to hearings. Indeed, even aliens with valid legal defenses to the charges, or aliens with strong claims to continued residence because they have resided here for many years or because they have spouses and children who are citizens or

permanent residents, have failed to seek hearings or have waived their right to hearings.

In this lawsuit, plaintiffs challenge the notice procedures employed by the INS in document fraud cases, arguing that they fail to adequately apprise respondents of their rights and the consequences of waiving them. Both the INS' standard forms, and the way those forms are generally used, are at issue.

A. Forms Used by the INS in Document Fraud Cases

The INS implements § 274C using several forms. When an alien is charged with document fraud in violation of § 274C, he or she is given a Notice of Intent to Fine (NIF). The standard NIF form, Form I-763C (06/26/92), provides, in part that "it is the intention of the [INS] to order you to cease and desist from such violation(s) and to pay a civil money penalty. . . ." The NIF further provides that the alien has the right to contest the NIF, and that to do so, he or she must

> [f]ile a written request for a hearing before an administrative law judge within 60 days from the service of this Notice. A written request for a hearing is deemed filed when it is either received by the Service Office designated below, or addressed to such office, stamped with the proper postage, and postmarked within the 60 day period.

The NIF also provides that the alien may, but is not required to, submit a written response to the allegations, that the alien has a right to counsel at no expense to the government, and that any statements may be used against the alien. Finally, the NIF provides that "[i]f a written request for a hearing is not timely filed, the Service will issue a final and unappealable order directing you to pay a fine in the amount specified in

this Notice and to cease and desist from such violation(s)." The NIF does not provide any information about other consequences of a final order under § 274C, including deportability and excludability. The NIF form is written entirely in English.

When the NIF is served, the INS also frequently serves the alien with a Notice of Rights/Waiver form (NOR/W). Form I-822 (06/26/92). This form, also exclusively in English, bears the title "Notice of Rights Pursuant to Section 274C of the Immigration and Nationality Act" at the top of the form. It then includes a description of rights as follows:

> You have been served with a Notice of Intent to Fine (NIF) (Form I- 763C) for violation of Section 274C of the Immigration and Nationality Act ("the Act"), which provides for civil penalties for certain specified acts involving document fraud.
>
> Under this law, you have the following rights:
>
> - the right to be represented by an attorney at your own expense;
> - the right to file with the INS a written request for a hearing before an administrative law judge; failure to file a request for a hearing within 60 days of the service of a NIF will result in the issuance of an unappealable Final Order; a request for a hearing is not deemed to be filed until received by the Service office designated in the NIF or addressed to such office, stamped with the proper postage, and postmarked within the 60-day period;
> - the right to pre-hearing process, including the right to discovery;

- the right to an evidentiary hearing before an administrative law judge on the charges contained in the NIF;
- the right to appeal the decision of the administrative law judge to an Office of the Chief Administrative Hearing Officer, and the right to seek judicial review therefrom.

At the close of this list of rights, the NOR/W provides:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

The NOR/W further provides a waiver section, which reads as follows:

> If you wish to waive the 60-day period in which to request a hearing, and accept the issuance of an unappealable Final Order before the 60-day period expires, you may execute this waiver. By executing this waiver, you give up the above-stated rights and admit that the charges contained in the NIF are true. You further admit that you have violated section 274C of the INA, and accept the issuance of a Document Fraud-Final Order (Form I-764C) on these charges.
>
> I acknowledge that I have (read) (had interpreted and explained to me in the _____ language) and understand the contents of this document, a copy of which I have received. I further understand that I waive the right to request a hearing before an administrative law judge, and agree to pay the

> penalty amount, as specified in the Final Order. I understand that this waiver shall result in the entry of a Final Order for a violation of Section 274C of the Act from which there is no appeal.

The NOR/W, as noted, is an English-only document. However, some INS offices or agents also provide the alien with a version of the form translated into English. The version of this document submitted to the Court bears no standard INS form number. The INS concedes that it has no official translated version of this form, and that individual offices using translated versions have prepared the translations on their own.

An alien served with an NIF and an NOR/W, may also receive an Order to Show Cause and Notice of Hearing (OSC). Form I-221 (Rev. 6/12/92) N. This form orders the alien to show cause why he or she should not be deported. The OSC form advises the alien that the INS alleges that the alien is not a citizen and that the person is subject to deportation for a specific reason, such as entering without inspection. The form advises the alien that he or she is being ordered to appear before an immigration judge to show why he or she should not be deported, and further either advises the alien of the date and time of the hearing, or, more likely, advises the alien that the date and time for the hearing will be mailed to the alien at the address he or she provides at the time of service. The form further provides a lengthy description of the hearing process, the alien's rights, and the consequences of allowing a deportation order to be entered in his or her absence. The OSC form, which is several pages long, is translated, line for line, into Spanish. On pages containing only information explaining the alien's rights, the form is in a dual-column format, so the Spanish translation

appears side-by-side with the English explanation of rights.

In addition, the alien may receive a form entitled "Request for Disposition." Form I-827A (August 26, 1992). This form provides two options: One option the alien may check provides: "I request a hearing before an immigration judge to determine whether or not I may remain in the United States." The second option consists of an admission of illegal alien status and waives the right to a hearing. This INS also uses a version of this form that is completely translated into Spanish. Despite the general language of the request-for-hearing option on Form I-827A, the form is treated by the INS as a request only for a hearing on the deportation allegations in the OSC; requesting a hearing by checking the box and signing this form does not constitute a request for a hearing on the § 274C document fraud charges.

B. Non-Citizen Experiences in Document Fraud Cases

The overwhelming majority of persons charged under § 274C are non-citizens. Nationwide, about 4,000 non-citizens have been charged under § 274C. According to the plaintiffs, only about 10% of the persons charged have timely requested hearings, despite the severe immigration consequences. About 21% of the individuals charged have executed waivers within the 60-day period, a percentage which has risen significantly since May of 1995.

The evidence demonstrates that a confluence of factors renders it unlikely that a non-English speaking alien will understand the consequences of either executing a NOR/W or failing to request a hearing. First, INS fails, in most cases, to provide NIF and NOR/W

forms translated into Spanish. The few offices that do provide translations have done so on their own, not in response to any INS directive or policy. Second, a number of INS agents' testimony indicates that the agents themselves do not understand or cannot explain the immigration consequences of a final order under § 274C, or both. Agents who cannot explain the consequences to non-English speaking aliens are quite clearly unable to rectify any inadequacies in the forms. Third, the NIF and NOR/W forms do not provide, in language clear to laypersons with little or no knowledge of the law, the consequences of a final order under § 274C, the consequences of failing to request a hearing, or the consequences of executing the NOR/W. The forms fail to indicate in clear, simple terms that a document fraud final order leads to immediate deportation with almost no chance of readmission, as opposed to a mere fine. Fourth, the practice of serving the NIF and NOR/W simultaneously with the OSC and the Request for Disposition leaves many aliens with the false impression that the deportation hearing will also address the document fraud charge, or with the false impression that the charge in the OSC is the only charge for which the alien is deportable.

Thus, although document fraud charges against aliens may be handled in a variety of different ways, the end result is often the same: the non-citizen charged under § 274C is not informed that he or she must request a hearing in writing, separately from the hearing on the deportation charge, and that the failure to request a hearing or the waiver of the right to a hearing effectively disposes of all issues related to deportation and exclusion.

III. MOTION FOR CLASS CERTIFICATION

Plaintiffs move for certification, pursuant to Fed. R. Civ. P. 23, of a class consisting of "all non-citizens who have or will become subject to final § 274C orders based on their failure to request a hearing."

Rule 23(a) allows a case to proceed as a class action if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the named plaintiffs' claims or defenses are typical of the claims or defenses of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, plaintiffs must also meet the requirements of Rule 23(b), which provides, in relevant part, that an action may be maintained as a class action only if prosecution of separate actions would create a risk of inconsistent adjudications resulting in incompatible standards of conduct for defendants, or if the defendants have acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief with respect to the class as a whole appropriate.

There is no genuine dispute on the issues of numerosity and typicality. Defendants focus on commonality, adequacy of representation by the class representatives, and the 23(b) requirements.

A. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class before the action may be certified as a class action. The commonality requirement does not mean that all questions of law and fact must be common to the class. *Jordan v. County of Loss Angeles*, 669 F.2d 1311, 1320 (9th Cir.), *vacated on other grounds*, 459 U.S. 810, 103 S. Ct. 35 (1982), *on remand*,

713 F.2d 503 (1983). A single issue of law or fact common to the class members may be sufficient. *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S. Ct. 57 (1976).

The INS argues that there is a lack of commonality among the class members claims because (a) the plaintiffs' allegations focus, in part, on oral representations made to individual plaintiffs, and (b) some INS offices, such as the Dallas office, have a policy of not using or accepting the English-only NOR/W forms and of not serving an OSC based on a document fraud charge on the same day that the NIF is served. The Court agrees with the INS that the plaintiffs cannot show that all of their cases share a common factual basis. Some of the putative class members claim that INS agents misrepresented to them the consequences of waiving their rights or the consequences of a final order, while others claim simply that the INS agents did not provide adequate written or oral notice. Some members of the putative class were issued NIF forms by offices that refuse to use the English-only NOR/W or, like the Dallas office, that do not accept waivers. Obviously, a plaintiff who admits that he understood what the waiver form meant, refused to sign it, and simply failed to request a hearing in time is on different footing than a plaintiff who did not understand the waiver form and signed it believing it was inconsequential.

These differences, however, do not defeat the motion for class certification. A class action may be maintained on the basis of common issues of law, including the adequacy of English-only NIF and NOR/W forms and the adequacy of notice when the OSC is served at the same time as the NIF and NOR/W. So long as there is

an overriding common issue of law, certification of the class under 23(b)(2) is appropriate. As explained in *International Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457, 462 (C.D. Cal. 1983), subsection (b)(2) was designed largely to permit maintenance of class action lawsuits as a vehicle for the redress of civil rights violations. Thus, even though the individual factual circumstances may vary among class members, the commonality requirement is satisfied in a suit such as this where it is alleged that the defendants have acted in a uniform manner with respect to the class. *Id.*; *see also Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982). The existence of a policy of providing information not reasonably calculated to apprise non-English speakers of their rights would, if such a policy exists, affect all members of the proposed class.

Moreover, allowing the INS to rely on the fact that some of its own offices do not use the English-only NOR/W forms and will not accept waivers to defeat class certification would lead to a twisted result—a government agency charged with a practice or pattern of violation of civil rights could escape declaratory and injunctive relief on a class-wide basis by showing that certain individual agents or offices took measures expressly to avoid violating the civil rights of immigrants. The Court is unwilling to conclude that class certification is inappropriate because certain INS offices have taken steps to protect the rights of aliens charged with document fraud.

B. Adequacy of Representation

The adequacy of representation prerequisite to class certification is satisfied if the Court finds that the representative class members are represented by qualified counsel and that the named representatives' interests are not antagonistic to the interests of the class. *Jordan*, 669 F.2d at 1323. There is no dispute concerning the adequacy of legal representation, and the Court is of the opinion that the legal representatives of the class members are well qualified.

The defendants argue that the plaintiffs here are not adequate class representatives for several reasons. During the pendency of this action, defendants deposed the class representatives under grants of immunity from criminal prosecution. Most of the class representatives admitted in their depositions that they used false documents. This fact alone, according to the INS, renders them inappropriate representatives of the class.

The Court disagrees. First, this argument is actually litigation on the merits, rather than on the class certification issue. The actual outcome of future hearings on document fraud charges is not at issue here. It is possible, even likely, that some members of the class will seek to have their document fraud proceedings reopened only to discover that they cannot mount an effective defense to the charge. That some members of the class are not entitled to ultimate relief on the charges of document fraud is not, however, dispositive of the issue of whether there exists a class of aliens who did not receive adequate notice of their rights and the consequences of waiving those rights. Second, even though the remedy here may only be a further

opportunity to petition to reopen the document fraud proceedings, the plaintiffs and the class members have gained a form of relief. Finally, the Court sees no legitimate issue concerning whether the class representatives are adequate in the sense that they are interested and involved in obtaining relief. The proper analysis of adequacy of representation focuses on whether the class representatives' interests are antagonistic to those of the class, such that the rights of other class members will be harmed by having their interests put forward by the class representatives. Defendants misapprehend the nature of an adequacy inquiry when they argue that the class representatives are inadequate simply because they might not ultimately succeed in defending against charges of document fraud.

The INS also argues that the plaintiffs suffer from issues concerning their credibility. The INS bears a heavy burden in attempting to demonstrate that the testimony the class representatives gave under oath is untrue. The Court is persuaded, from its review of the record, that this argument is, in fact, baseless. The INS complains of little more than the ordinary minor inconsistencies common in deposition testimony. Indeed, many of the credibility issues the INS purports to be concerned about are most likely the product of language barriers and confusion about the legal process. Most of the plaintiffs, like most of the putative class, have little formal education and either speak only Spanish or speak very little English.

Finally the INS argues that the class representative are inadequate because of their "obvious willingness to disregard the law." This reference to the fact that some members of the class entered the United States without inspection and used false documentation to obtain em-

ployment is, again, an unfair attack. The INS' reasoning would all but preclude judicial review of INS procedures related to the handling of aliens at the borders and during deportation proceedings.

C. Incompatible Standards or Declaratory & Injunctive Relief

Defendants argue that plaintiffs have not shown that there is either a risk of incompatible standards being established or that defendants acted or refused to act on grounds generally applicable to the potential class. Class certification under Rule 23(b)(2) requires that "the party opposing the class has either acted or failed to act on grounds generally applicable to the class." This has been interpreted as requiring that the opposing party "has acted consistently towards members of the class or has established a regulatory scheme common to all members of the class, and not that every member of the class has actually been injured by the opposing party." *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 998 (C.D. Cal. 1984).

The Court agrees with plaintiffs that certification is appropriate under 23(b)(2). The use of standardized forms in § 274C cases shows that the INS has acted on grounds generally applicable to the class, even though not every alien has received the NOR/W solely in English. The only appropriate remedy, if these allegations are established, is declaratory judgment and final injunctive relief.

D. Class Definition

Plaintiffs' propose a class defined as "all non-citizens who have or will become subject to final § 274C orders based on their failure to request a hearing." Defendants argue that this class definition is overly broad

and inconsistent with the class originally defined in the complaint. Defendants argue that the class definition should be limited to include, in essence: (1) persons who received inadequate notice because the standard English-only forms did not properly advise them of their rights and the consequences of waiving their rights or failing to request a hearing, (2) persons whose cases arose in an INS office that uses the NOR/W forms, and (3) persons who executed the NOR/W forms and waived their right to a hearing.

The Court agrees with defendants that the class, as proposed, may be somewhat broader than the class as originally proposed. More importantly, the definition proposed by plaintiffs may inappropriately include individuals charged with document fraud who received notice of rights that was not constitutionally inadequate. The focus of this litigation is, and should remain, adequacy of the notice procedures. Failure to request a hearing does not, in and of itself, indicate that a person did not receive adequate notice.

The Court therefore concludes that the class to be certified shall consist of:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Plaintiff's motion to certify the class, so narrowed in definition, is GRANTED.

IV. MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Under the Rule, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

Plaintiffs challenge four central features of the INS procedures under § 274C. First, they challenge the written NIF and NOR/W forms on the ground that they do not adequately apprise aliens of their rights. Second, plaintiffs challenge INS' practice of serving deportation forms, including the OSC and Request for Disposition, at the same time as they serve § 274C forms, on the ground that this is inherently confusing to the charged aliens. Third, plaintiffs challenge INS' practice of obtaining waivers of rights on the day of arrest, before aliens have a chance to consult with counsel. Finally, plaintiffs argue that they are entitled to have their § 274C proceedings reopened. Defendants argue that the class representatives cannot show prejudice, because they have admitted to using false documents. They also argue that the notice forms and procedures are constitutionally adequate.

A. Prejudice

As a threshold matter, defendants argue that the class representatives cannot show that they were

prejudiced by any violations of their due process rights, because they subsequently admitted in their depositions, under grants of immunity, that they used false documents. The Court rejects this argument.

The Ninth Circuit has repeatedly held that an alien is entitled to redress for violations of constitutional rights only where he or she can show prejudice. *See, e.g., Barraza Rivera v. INS*, 913 F.2d 1443, 1447-48 (9th Cir. 1990). Prejudice is found where an alien's rights are violated "in a manner so as potentially to affect the outcome of the proceedings." *Id.* (quoting *United States v. Cerda-Pena*, 799 F.2d 1374, 1379 (9th Cir. 1986)).

The parties appear to agree that the INS can take advantage of this rule only if it can show that none of the named plaintiffs suffered any prejudice. This the INS cannot do. Plaintiffs argue that each one of the named plaintiffs can show that the violations of his or her rights had a potential to affect the outcome of the § 274C proceedings. However, it is sufficient for purposes of this motion to conclude that at least one of the plaintiffs can show prejudice. The Court concludes that Ninfa Guerrero de Adames suffered prejudice as a result of the issuance of a final order under § 274C without a hearing.

Ninfa Guerrero de Adames testified that she used false documents only when she obtained work at Jack Brown Cleaners, which was prior to the effective date of § 274C and not chargeable. The INS asserts that Adames signed a statement while in custody and without representation that she used the documents later, after the effective date of the Act, when she got a job at National Linen. However, the National Linen I-9 form supports Adames' testimony, confirming that she did not present any documents when she started

working there. Adames, furthermore, testified that the statement she gave in custody was based on a misunderstanding with the agent, who did not speak Spanish.

Adames never had an opportunity to testify before an administrative law judge and attempt to show that the document fraud charge was ex post facto. Contrary to the INS' assertion that Adames cannot show prejudice because she admits to having had false documents, Adames has indeed shown prejudice, because she has never had the chance to demonstrate that she did not use false documents after the effective date of the Act. No judge has had the opportunity to review the competing claims and judge Adames' credibility. The absence of a hearing was, therefore, prejudicial to Adames, because the outcome might have been different had she received a hearing.

The Court also notes that class-representatives Antonio Santana-Alvarez can show prejudice. He was charged under § 274C only because he falsely made out an I-9 employer verification form. The Office of the Chief Administrative Hearing Officer has held, however, that as a matter of law this is not a violation of § 274C. *United States v. Remileh*, 1995 WL 139207 (O.C.A.H.O. Feb. 7, 1995).

Defendants' argument is unpersuasive for another reason as well. The INS asserts that the class representatives cannot show prejudice because they have admitted that they used false documents. This argument presumes, without demonstrating, that the only issue of any relevance in a § 274C proceeding is whether the documents were false. The plaintiffs have attempted to gather evidence that the INS attorneys sometimes drop charges when an individual alien requests a hearing, that the INS settles some cases,

and that an immigration judge may, in unusual circumstances, grant some type of relief to the alien. The INS has steadfastly resisted discovery directed to its internal policies concerning § 274C enforcement, and there is for that reason no evidence in the record.[1] On the record before the Court, the INS deserves no presumption that it completely lacks discretion. Indeed, were the Court to indulge a presumption, it would of necessity be in favor of plaintiffs' position that agency attorneys have the discretion to dismiss or settle § 274C cases, just as law-enforcement agency attorneys have such discretion in other matters.

B. Adequacy of Notice and Procedures

There is no disagreement about the basic proposition that aliens, even those who have entered the United States unlawfully, are entitled to the protections of the Due Process Clause of the Fifth Amendment. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S. Ct. 1883, 1890 (1976). Further, the parties agree that the adequacy of the NIF and NOR/W forms is to be determined according to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976). The factors to be balanced include: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and

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[1] There are pending motions to compel certain discovery related to precisely these issues. As the parties are aware, the Court tentatively concludes that these motions are moot, in light of the conclusions expressed here. The Court notes, however, that its commentary on the resistance to discovery is not intended to suggest how the Court would rule on those issues. The Court's analysis of the absence of evidence in the record on these issues is directed solely toward the issue of whether INS has discretionary policies regarding enforcement, and does not reflect any conclusion on the propriety of refusing to disclose those policies.

the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

(1) Private Interest at Stake

There can be no serious dispute that the private interest here is great, *see, e.g., Bridges v. Wixon*, 326 U.S. 135, 154, 65 S. Ct. 1443, 1452-53 (1945), and the Court for that reason does not belabor it. Aliens who are the subject of final orders issued without a hearing face essentially automatic deportation and permanent exclusion. The extent to which the Attorney General has discretion to waive excludability or inadmissibility has not yet been fully determined in the courts. The statute appears on its face, however, to limit such discretion. Further, the Board of Immigration Appeals recently held that immigration judges have no discretion to waive inadmissibility under § 212(i), 8 U.S.C. § 1182(i) in the face of a § 274C final order. *In re Lazarte-Valverde*, 1996 WL 82543 (BIA Feb. 9, 1996). Section 212(i) grants the Attorney General the discretion to waive inadmissibility on the ground that the immigrant is the spouse, parent, or child of a United States citizen or lawful permanent resident. Board Member Lory Rosenberg, concurring in the decision, explained that § 274C

> provides a legal response to certain forms of document fraud, not only by imposing civil fines, but then by permanently deporting and excluding violators without exception. The reach of the statute is extremely broad and encompassing; it sanctions not only major counterfeiters, dealers, and purveyors of fraudulent documents, but holders or

> users. . . . [The statute's] violation is inexorably linked to permanent removal and expulsion. Given the cause and effect relationship between civil document fraud and permanent expulsion, it is curious and indeed unfortunate and that, in a statutory scheme replete with the delegation of discretion to the Attorney General, there is none so delegated here.

Id., Concurring Opinion of Lory Rosenberg, at 2.

(2) Risk of Erroneous Deprivation and Value of Additional Safeguards

The risk of erroneous depravation is directly linked to the issue of whether the NIF and NOR/W form apprise a § 274C respondent of his or her right to a hearing. Due process requires that a person facing governmental deprivation of life, liberty or property receive adequate notice and an effective opportunity to defend. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1019-1020 (1970). Notice satisfies due process if it is of such a nature as reasonably to convey the necessary information. *Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1112 (1995). The information provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978). The Supreme Court has repeatedly reiterated that due process is a flexible concept, and that notice must be "tailored to the capacities and circumstances" of the intended recipient. *Goldberg*, 397 U.S. at 268-69, 90 S. Ct. at 1021.

Plaintiffs argue that the NIF and NOR/W forms are not adequate because (1) they are provided in English only, (2) they are unnecessarily legalistic and technical, and (3) they fail to apprise respondents of the immigration consequences of a final order under § 274C. The Court agrees.

The evidence shows that nearly all recipients of the NIF and NOR/W forms are non-citizens, and a substantial majority of them are native Spanish speakers. In some parts of the country where many § 274C charges are processed, the overwhelming majority of the respondents are native Spanish speakers. And, although some of the respondents may understand some English, many others so not understand or speak English at all. Also, the respondents, as a group, are relatively uneducated, whether in English or Spanish. Yet the NIF and NOR/W forms authorized for use by the INS are prepared in English only.

The NIF and NOR/W forms employ highly technical, legalistic language. The NIF states that "it is the intention of the Service to order you to cease and desist" and to "pay a civil money penalty." The NIF advises the respondent that he or she may receive a "final and unappealable order" to pay a fine and be ordered "to case and desist" from violations. The NOR/W uses similar terms, such as "civil penalties for certain specific acts involving document fraud," a right to "pre-hearing process," and the "issuance an unappealable Final Order." The NOR/W also includes the one and only reference to the fact that "as an alien subject to a Final Order for violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act." Aside from this single refer-

ence to the terms "deportable" and "excludable," there is no mention whatever in the forms of immigration consequences of a final order under § 274C. Rather, the forms repeatedly mention the fact that the alien is subject to a fine.

The confusing nature of this language, whether in English or Spanish, is manifestly evident from the record. Most, if not all, of the aliens who testified stated that they did not understand the forms, and did not realize that they faced permanent exclusion. This is proof enough of the confusing nature of the language used. However, the record also demonstrates that many INS agents do not understand the forms, either. INS agents who testified were unable to explain the hearing process or the proper procedure for requesting a hearing. Some of the agents did not themselves realize that there are severe immigration consequences from a final order, and that the consequences are, by and large, permanent. One agent testified that so long as the alien pays the fine, there are no consequences at all. This is, of course, completely false. Giving such advice to an alien would obviously be an encouragement to waive his or her rights and pay the fine.

The technical, legalistic nature of the NIF and NOR/W documents is profoundly exacerbated when they are used contemporaneously with the deportation OSC, which is carefully written in plain English, plain Spanish, and goes to great lengths to advise the respondent of what lies ahead. As explained above, aliens being served with NIF and NOR/W forms are often served at or near the same time with an Order to Show Cause why the alien should not be deported, often for some other reason. The OSC can add to the confusion created by the NIF and NOR/W in several ways. First,

an alien may check the box to request a hearing on the Request for Disposition served with the OSC in the mistaken belief that this hearing will also address the § 274C charges. This situation is caused in part by the fact that the OSC and Request for Disposition are written in plain language, in both English and Spanish. Both of these forms advise the alien that he or she will get a chance to argue to a judge why he or she should be allowed to stay in this country. Although the deportation hearing is different from the NIF hearing, this is not apparent from the NIF, NOR/W and the OSC. In fact, the language of the hearing request on the Request for Disposition on the deportation charge strongly suggests that the hearing will cover any and all matters affecting whether the alien will be deported. Thus, many members of the class believed, erroneously, that their request for a deportation hearing also applied to the document fraud charges. In reality, their failure to request a hearing (or waiver of the right) on the § 274C charges rendered their deportation hearing requests completely futile, because they were subject to a final orders on the § 274C charges. The very fact that many members of the class have done exactly this forecloses any serious argument that they have been adequately apprised of their rights: a non-citizen who understood the consequences of executing the NOR/W would not waive on one form all of his or her rights while requesting a deportation hearing on another form.

Even aliens who request voluntary departure instead of a deportation hearing suffer if they fail to request a hearing on the § 274C charge. Voluntary departure is a benefit that allows an alien to leave the U.S. without being subject to the five-year moratorium on returning

to the U.S. that comes with a formal order of deportation. 8 U.S.C. § 1182(a)(6)(B). In some cases, aliens who elect voluntary departure are served with NIF and NOR/W forms. If the alien fails to request a hearing on the § 274C charge, he or she will be subject to a final order and rendered permanently excludable. This has the effect of nullifying the benefit of taking voluntary departure.

Finally, serving the OSC and Request for Disposition, which explain serious immigration issues in Spanish, leaves many aliens with the false impression that the NIF and NOR/W forms, served in English only, are inconsequential documents. Even aliens who understand some English are susceptible to this misimpression, because the NIF says nothing about deportation or other immigration consequences, and because the terms "deportation" and "exclusion" are buried on the NOR/W in a mountain of inaccessible legal terminology and citations to the INA.

Defendants' arguments that the NIF and NOR/W adequately apprise non-citizens of their rights are unpersuasive. The Court notes, at the outset, that several INS offices have, acting on their own, either translated the NIF and NOR/W forms into Spanish to increase the likelihood that respondents will understand them, or have decided not to accept waivers of rights at all. This fact alone is potent evidence of the experience of agents in the field who have witnessed non-citizens taking the utterly inconsistent steps of requesting a deportation hearing on the Request for Disposition form while waiving their rights to the § 274C hearing on the NOR/W.

Nor do the relevant authorities compel the conclusion that the notice provided here, considering all the circumstances, is adequate. There is, of course, no binding authority that stands for the proposition that notice must always be provided in the language of the intended recipient. On the other hand, courts have long recognized that due process is a flexible concept; to be adequate, the form of notice must be tailored to the capabilities and peculiarities of the recipient audience. Courts have frequently held that adequate notice requires accommodation of both the language limitations of a non-citizen audience and the educational limitations of the intended recipients. *See, e.g., Padilla-Augustin v. INS*, 21 F.3d 970, 976 (9th Cir. 1994) (explaining that when the alien is representing himself and has language difficulties, "a high degree of clarity should be a part of the process accorded"); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (issuing preliminary injunction requiring that Salvadoran refugees receive notice of their rights in English and Spanish); *David v. Heckler*, 591 F. Supp. 1033, 1042-43 (E.D.N.Y. 1984) (holding that highly technical review notices provided to members of class of elderly Medicare beneficiaries did not provide adequate notice).

Defendants' reliance on *Kirk v. INS*, 927 F.2d 1106 (9th Cir. 1991), for the proposition that the NIF provides a respondent with adequate notice is particularly misplaced. In *Kirk*, the persons charged with document fraud were two United States citizens, owners of Kirk Enterprises, who were charged under the Section 274A, 8 U.S.C. § 1324a, which addresses document fraud on the part of employers. There was, in *Kirk*, no issue concerning whether the notice was constitutionally deficient because it was in English or because it

was highly technical and used legal terminology. Rather, the due process issue concerned the propriety of service on the Kirks' attorney.

The Court concludes that the standard INS NIF and NOR/W forms do not adequately apprise respondents of their rights to hearings and of the consequences of failing to do so. First, the use of English-only forms in a context in which it is uncontestable that most respondents speak primarily or only Spanish is simply unacceptable, particularly where, as here, the consequences are grave and the situation in which the forms are provided suggests either that a different hearing will address the charges, or that the consequences of a final order are minimal. Second, the use of highly technical legal terminology in the forms does not provide fair notice. The use of non-technical language in the OSC and Request for Disposition forms, far from alleviating the problem, actually makes it worse. And using complicated references to the statute in the one sentence that does address deportation and exclusion almost guarantees that an alien who is not proficient in English and American law will fail to understand the consequences of a final order. Finally, contemporaneous service of the OSC and its relatives along with the NIF and NOR/W increases the already great risk of erroneous deprivation of rights.

(3) Burden on the INS

The Court is further persuaded that the burden on the INS to provide greater procedural protections is quite small. Obviously, the one-time expense incurred in redrafting and translating the NIF and NOR/W is not great. Defendants argue that if the INS is required to translate the NIF and NOR/W for the benefit of Spanish-speaking aliens, then presumably the agency

will be required to translate the forms into any language spoken by an alien. These dramatic concerns are unfounded, and the Court is not persuaded that an injunction requiring translation of two forms into Spanish will leave the INS perched upon the slippery slope. The Court notes that the INS has already chosen to translate OSC forms and Requests for Dispositions into Spanish. This demonstrates an awareness that, under the prevailing circumstances, Spanish translation is a component of notice "reasonably calculated" to apprise individuals of their rights. Most immigrants facing § 274C charges speak Spanish. Accommodating the needs of the many need not lead to a requirement that INS accommodate the needs of the very few.

The Court also notes that the INS can avoid the expense of redrafting and translating the NOR/W altogether just by discontinuing its use. The INS is under no statutory duty to seek a waiver of the right to a hearing. The policy decision to do so brings with it greater burdens, as discussed in more detail in the next section. A significant portion of the risk of ill-informed waivers can be avoided by not seeking them, and leaving it up to the alien charged under § 274C to timely request a hearing.

Finally, the Court agrees with plaintiffs that there is no undue burden on the INS to ensure that, if the NIF and NOR/W are to be served at or near the same time as the OSC and the Request for Disposition, the INS must ensure that the forms adequately apprise the respondent that the two proceedings are completely different and that the alien must, in fact, request two separate hearings in order to protect his or her rights.

C. Adequacy of Procedures for Obtaining Waivers

The plaintiffs also argue that the INS' procedures for obtaining waivers at the time of arrest on the document fraud charges violates due process because the waivers are not knowing and intelligent. A waiver is effective if it is clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, (1938); *United States v. Lopez-Vasquez*, 1 F.3d 751, 753 (9th Cir. 1993).

Plaintiffs argue that, under *Mathews*, obtaining a waiver at the time of arrest, before the alien has had a chance to consult with counsel, attempt to understand the forms, or obtain a translation, creates an unacceptable risk that the waivers are unknowing and unintelligent. The Court agrees that, for all of the reasons explained above, there is a serious risk that an alien charged under § 274C and presented with NIF and NOR/W forms will execute the waiver without understanding that the consequences of a final order include deportation and exclusion. The risk of this error is greatly exacerbated by the presentation of the NIF and NOR/W at the same time the Spanish language OSC and Request for Disposition are served.

The risk of erroneous waivers is, as plaintiffs argue, one that the INS has created for itself by instituting a policy of seeking waivers. Nothing in the statute requires, or even suggests, that the INS seek waivers from aliens charged under § 274C. When no waiver is sought, of course, the alien simply has 60 days in which to request a hearing, or suffer the consequence of the entry of a final order without a hearing. The INS could sit idly by and wait for respondents to not request

hearings. However, having chosen to seek affirmative waivers, the INS places upon itself the greater burden of demonstrating that such waivers are obtained under the exacting "knowing, voluntary, and intelligent" test.

Nonetheless, the Court cannot agree with plaintiffs that fundamental due process requires that the NIF and NOR/W never be served at the same time as the OSC and the Request for Disposition. The INS has legitimate administrative interests in serving these documents at the same time, particularly where the alien opts for voluntary departure. The Court concludes that whatever problems are presented by the contemporaneous service of these forms can be remedied by the entry of an injunction requiring appropriate translation of plain-speaking forms that will adequately apprise a Spanish-speaking respondent of the nature of the § 274C charge, his or her rights, including the right to counsel, and the consequences of the final order and of waiving the right to a hearing.

D. Reopening Procedures

Plaintiffs urge the Court to order the INS to reopen the § 274 proceedings for each of the class members. The INS argues that because the agency orders are final and unappealable under the statute, the proceedings cannot be reopened. 8 U.S.C. § 1324c(d)(2)(B); 8 C.F.R. §§ 270.2(f) and (g). The Court rejects this argument. Congress expressly provided that notice be provided to the § 274C respondent prior to the entry of a final, unappealable order. Thus, an order obtained through unconstitutional measures may be set aside altogether. *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990). The Court concludes that the INS must provide the class members with, at a minimum, the opportunity to peti-

tion the INS, or file a motion, to reopen their proceedings based on the lack of notice.

E. Conclusion

Plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART. The Court concludes that the INS' standard procedures in document fraud cases violate due process by failing to inform class members of their right to a hearing, by failing to inform class members of the consequences of a final order under § 274, by failing to inform class members of the consequences of waiving their rights, and by failing to adequately explain the differences between the deportation-related forms, such as the OSC and the Request for Disposition, and the NIF and NOR/W. The Court further concludes that serving the forms in their current configuration, that is, in highly technical, legalistic English, fails to adequately apprise the typical respondent of his or her rights. Finally, the Court concludes that serving the NIF and NOR/W forms, as they are written now, at or near the time the OSC and Request for Disposition are served violates due process. Plaintiffs shall be entitled to petition the appropriate INS authority to reopen their cases.

To the extent the plaintiffs seek an injunction barring the INS from seeking waivers, however, the motion for summary judgment is DENIED.

The plaintiffs' request for the entry of an injunction is GRANTED. Plaintiffs are directed to submit a proposed form of injunction within 30 days of the date of this order. As the parties were advised at oral argument, the Court encourages the parties to attempt to agree on the form of injunction. If the parties are unable to agree on a form of injunction, they are

directed to notify the Court of this at the time plaintiffs' submit the proposed form of injunction, and the Court will set a briefing schedule.

V. MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs sought the entry of a preliminary injunction at essentially the same time they filed a motion for summary judgment. The Court concludes that, under all the circumstances present here, including the parties' earlier agreement to a considerable stay in order to pursue settlement, that a preliminary injunction is not warranted. The motion for a preliminary injunction is therefore DENIED.

VI. OTHER MOTIONS

In light of the Court's determination on the merits, the remaining discovery motions are MOOT. Defendants' motion to file certain exhibits late is GRANTED.

SO ORDERED this 11 day of March, 1996.

/s/ JOHN C. COUGHENOUR
JOHN C. COUGHENOUR
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C94-1204C

MARIA WALTERS, ET AL., PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed: Oct. 2, 1996]

ORDER AND PERMANENT INJUNCTION

This matter comes before the Court on plaintiffs' proposal for a permanent injunction. Having reviewed the pleadings, memoranda, exhibits and other documents on file, the Court now finds and concludes as follows:

I. BACKGROUND

The Court on March 13, 1996 granted summary judgment in favor of plaintiffs. It ruled that defendants' standard procedures in document fraud cases under section 274C of the Immigration and Naturalization Act of 1990 violate due process by failing to inform class members of their rights and the immigration consequences of section 274C charges. The Court further

ruled that plaintiffs were entitled to permanent injunctive relief. Plaintiffs have proposed a permanent injunction, to which defendants have objected. The Court will address the parties' primary areas of disagreement, and will enter a permanent injunction and final judgment in this matter.

II. ANALYSIS

A. Motions to Reopen Section 274C Proceedings and Deportation Proceedings.

The principal disagreement between the parties as to the proper form of injunction is whether the Court ruled that all individuals who received the deficient Notice of Intent to Fine ("NIF") form or the Notice of Rights/Waiver ("NOR/W") form are automatically entitled to reopen their section 274C proceedings when a final order has been entered against them, or whether such persons must make an additional factual showing that their particular notice was insufficient before those proceedings are reopened.

In ruling on the class certification and summary judgment motions the Court acknowledged that some aliens charged with the deficient forms may still have received constitutionally adequate notice. The Court explained that a "plaintiff who admits that he understood what the waiver form meant, refused to sign it, and simply failed to request a hearing in time is on different footing than a plaintiff who did not understand the waiver form and signed it believing it was inconsequential." Order of March 13, 1996 (hereafter "Order") at 12. Accordingly the Court defined the class as:

> All non-citizens who have or will become subject to a Final Order under § 274C of the INA *because* they received notice forms that did not adequately

> advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Order at 18 (emphasis added). This definition limits the class to those who became subject to a final order through their failure to request a hearing, and who failed to request a hearing because their notice forms did not adequately advise them of their rights or the consequences of failing to exercise those rights.

The Court then found that in using the NIF and NOR/W and following certain other standard procedures defendants acted on grounds generally applicable to class members. Order at 17. The Court concluded that defendants use of these forms and procedures "fail[ed] to adequately apprise the typical respondent of his or her rights." Order at 37. The Court fell short, however, of declaring that all aliens who received these forms or were subject to the prohibited procedures were denied due process.

This ruling left open the possibility that, despite the use of the deficient forms and general procedures, some individuals may have received sufficient notice of their rights to make an informed decision about whether to request a hearing. This could happen, for instance, because an individual read and understood the forms, or because an individual was given an additional, easily understood explanation of his or her rights. In such a case the individual would not have been a class member, and would not have been denied constitutional notice.

In so ruling, however, the Court did not intend to require each individual to reprove the inadequacy of his or her notice. That would eviscerate the Court's

broader holding that the general forms and procedures used by defendants were constitutionally deficient. Rather, under the ruling aliens who were charged with the deficient forms and procedures and who did not understand their rights or the consequences of failing to exercise those rights, are class members who received constitutionally inadequate notice. Moreover, because the Court found that the deficient forms did "not adequately apprise respondents of their rights to hearings and of the consequences of failing to [exercise those rights]," it will be enough for an alien charged with those forms to attest to his or her lack of understanding to be eligible for relief. *See* Order at 31.

Unless the government can show that the deficiencies in the forms and procedures were somehow cured due to the unique circumstances surrounding the charging of such an alien, then each such alien consequently subjected to a section 274C final order is entitled to have his or her section 274C proceeding reopened. If the government wishes to challenge the alien's entitlement to reopening, it must prove by a preponderance of the evidence in a hearing before an administrative law judge that despite the use of the forms or procedures found to be deficient, the alien received constitutionally sufficient notice. The standard for reopening described herein is accordingly less demanding than the standard usually employed for immigration proceedings. *See Caruncho v. INS*, 68 F.3d 356, 360-61 (9th Cir. 1995).

If a section 274C proceeding is reopened, defendants must provide new notice forms to the alien that comply with the Court's summary judgment ruling so that the alien may make an informed decision as to whether or not to request a document fraud hearing. A reopened section 274 proceeding must be conducted as if the

charges were for the first time being brought against the alien.

If at the conclusion of a reopened proceeding the document fraud charges are not affirmed, then the final order under section 274C must be vacated. If that occurs, then the alien may be entitled to further relief from any deportation order he or she may be subject to, if that deportation order was based on or could have been affected by a vacated section 274C final order. If that is the case, the alien will at a minimum be entitled to have his or her deportation proceeding reopened.[1] This is necessary because if a deportation order was based on or affected by a vacated section 274C final order, it would have been obtained through an unconstitutional measure and so must be set aside. *Mendez v. INS*, 563 F.2d 956, 958-59 (9th Cir. 1977); *Wiedersperg v. INS*, 896 F.2d 1179, 1183 (9th Cir. 1990).

Moreover, the INS will be required to join in any motion to reopen deportation proceedings so that no alien will be prevented from so moving as a result of new immigration regulations that limit aliens to one motion to reopen, and requires them to file such motions within 90 days of the decision or by September 30, 1996, whichever is later. 8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(4)(i). An exception to this rule exists when the motion to reopen is "agreed upon by all parties and jointly filed." 8 C.F.R. §§ 3.2(c)(3)(iii) and 3.23(b)(4)(ii). Because many affected aliens would be excluded from filing a motion to reopen by the new rules unless the INS joined in the motion, that is the remedy that must

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[1] As with section 274C proceedings, this standard is less demanding than the usual standard for reopening. *See Caruncho*, 68 F.3d at 360-61.

be provided. Even if it joins in the motion, the INS will still be able to contest the merits of the underlying issues in the reopened proceedings. 8 C.F.R. § 3.2(c)(3)(iii).

B. Parole of Aliens into United States.

The parties also disagree about whether any class members should be paroled into the United States to attend reopened proceedings that are held to remedy the deficient notice provided by the INS. When a person is paroled into the country, the person is not considered to have made a formal entry or to have been admitted. *Yuen Sang Low v. Attorney General*, 479 F.2d 820, 821-22 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973). In a situation similar to the present case, the Ninth Circuit ordered the INS to admit a deported alien into the United States to attend reopened deportation proceedings. *Mendez*, 563 F.2d at 959. The proceedings were reopened because the INS had violated its own rules in ordering the alien deported. *Id.* In addition, under 8 U.S.C. § 1182(d)(5) the INS may parole into the United States an alien applying for admission if the parole is "for emergent reasons or for reasons deemed strictly in the public interest."

In the present case, any alien who has been deported as a result of inadequate notice of section 274C charges is entitled to move to reopen those proceedings, and depending on the outcome of that motion may become entitled to move to reopen his or her deportation proceedings. If during this process an alien is entitled to attend a hearing, meaningful relief from the original, improper notice may be obtained only if such attendance is allowed. Thus, the INS must parole the alien or make other arrangements to allow the alien to

attend. This approach is consistent with *Mendez* and the applicable regulations.

C. Enjoining Section 274C Proceedings Initiated with Deficient Notice Forms in Which No Final Order Has Been Entered.

Plaintiffs propose enjoining the issuance of final orders in section 274C proceedings that are still pending in which an alien was charged with deficient notice forms and failed to request a hearing. They would require the INS to recharge such aliens before proceeding further. This would be a direct, effective remedy for those who received inadequate notice of their rights.

The government objects to the burden of recharging, especially in cases where they are no longer able to locate the alien. However, plaintiffs persuasively argue that this burden is light because the INS would have to locate the alien to enforce a section 274C final order, even if they were not required to recharge them. Thus, when the INS next has contact with such aliens it can recharge them.

Accordingly, the INS will be required to recharge any alien who was charged with the deficient forms and failed to request a hearing, but has not yet been subjected to a final order. The Court recognizes that this requirement could result in the recharging of aliens who despite receiving the deficient forms still understood their rights or otherwise received sufficient notice. But the alternative to this approach would be to require the INS to serve all aliens with charges pending against them with notice that they could apply to have the INS recharge them, and then to permit such aliens to make the appropriate application. The Court concludes, however, that this two-step approach would

be much more burdensome for both affected aliens and the INS. Moreover, if some aliens are recharged who received adequate notice despite originally being charged with the deficient forms, the INS will not be prejudiced because it will still have the opportunity to continue to prosecute them for document fraud.

In addition, if the INS does not wish to recharge an alien who did receive sufficient notice the Court will, as it has with those aliens who have had final orders entered against them, permit the INS to avoid recharging if it can prove by a preponderance of the evidence in a hearing before an administrative law judge that despite the use of the forms or procedures found to be deficient, the alien received constitutionally sufficient notice.

D. Content of New Charging Forms.

Plaintiffs drafted new charging forms, which they suggest the INS be ordered to use. They would substitute a "Notice of Charges" for the NIF found deficient by the Court, and a "Request for Disposition" for the NOR/W found deficient by the Court. The Court agrees with defendants, however, that the INS should be permitted to use its expertise to draft notice forms that comply with the Court's summary judgment ruling. This will allow them to more easily integrate the forms into their current procedures.

The Court will not at this time pass judgment on the new NIF proposed by the INS. However, the Court notes that the title "Notice of Intent to Fine" is not per se deficient so long as the form otherwise emphasizes the severe and permanent immigration consequences of a section 274C final order.

E. Obtaining Waivers.

Plaintiffs seek to prevent defendants from accepting any waiver of a section 274C hearing that is not knowing, informed and voluntary, and from accepting a waiver at the same time that a section 274C charging document is served. The first provision is unnecessary in that it merely directs defendants to follow the law, and the second provision goes beyond the scope of the Court's summary judgment ruling. The Court specifically denied the portion of plaintiffs' summary judgment motion that asked that defendants be prohibited from obtaining waivers at the same time as they charged aliens with section 274C document fraud. Order at 34, 37.

F. Non-Spanish Oral Translations of Notice Forms.

When the INS serves section 274C charging documents at the same time as it serves deportation related forms, plaintiffs would require the INS to "explain" the importance and separate nature of the forms. In addition, plaintiffs propose that if the INS orally translates deportation related forms into any one language, that it also be required to orally translate the section 274C charging documents into that language. These provisions are based on the Courts finding that the risk that an alien may be confused and may not make an effective, knowing waiver are "greatly exacerbated" by the presentation of section 274 charging documents and deportation related forms at the same time. Order at 34.

But requiring defendants to explain and to make oral translations (in Spanish or any other language), goes beyond the Court's ruling. The Court specifically found that the problem caused by the contemporaneous

service of the forms can be remedied by an injunction "requiring appropriate translation of plain-speaking forms that will adequately apprise a Spanish-speaking respondent of the nature of the section 274C charge." Order at 35. Nowhere did the Court require oral explanations or translations. The Court also specifically rejected the notion that defendants should be required to translate into languages other than Spanish. Order at 32-33.

G. Issues Remaining in Case.

The government argues that the Court improperly failed to rule on three issues that it raised on summary judgment. It requests that the Court partially grant its motion for summary judgment by dismissing these three claims: (1) plaintiffs' assertion that they are entitled to a written translation of the NIF and NOR/W forms into languages other than Spanish, and to oral translation of the forms into all other languages,[2] (2) plaintiffs' assertion that INS agents were required to serve the NIFs on plaintiffs' attorneys and were prohibited from obtaining waivers without letting the aliens consult with counsel, and (3) plaintiffs' assertion that INS agents coerced plaintiffs into waiving their rights to a hearing on section 274C charges.

The Court's Summary Judgment Order and Permanent Injunction together grant or deny substantially all of the injunctive relief requested by plaintiffs in their complaint. The injunctive relief prayed for by plaintiffs was based on three separate legal theories, which were due process violations, statutory violations and Admin-

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[2] The translation issues raised by the government are addressed in section F of this Order, and in the Court's Summary Judgment Order at 32- 33, and 35.

istrative Procedure Act violations. As such plaintiffs' complaint must be construed as a single claim for broad injunctive relief based on multiple legal theories. *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978) (defining claim for purposes of Fed. R. Civ. P. 54). The relief provided by the Court is based on due process violations. But because the Court has granted or denied substantially all the relief requested by plaintiffs, there is no reason to rule on the alternate grounds for that relief represented by the three issues defendants ask the Court to decide. Rather, the Court will enter final judgment on the entire action.[3]

H. Permanent Injuntion.

Therefore the Court ORDERS that defendants are permanently enjoined as follows:

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[3] Alternatively, the Court could grant plaintiffs' request that the remaining issues identified by defendants be dismissed without prejudice. This request should be construed as a motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). The decision to grant a motion for voluntary dismissal is in the discretion of the district court. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994). In making the decision, the court must consider whether the defendant will suffer some plain legal prejudice. *Id.* The inconvenience of defending another lawsuit or the fact that defendants have already begun trial preparations does not constitute prejudice. *Id.* In this case, defendants could potentially face these three issues in a future lawsuit, but that would not be enough to prevent dismissal with prejudice. Moreover, that is unlikely because plaintiffs have been substantially afforded the relief they requested. And although defendants have invested substantial time and effort into litigating, this trial preparation would not be a reason to deny voluntary dismissal without prejudice. Moreover, most of that time would have been spent to defend against the theories upon which the Court chose to base its rulings.

1. Defendants are enjoined from using the versions of the Notice of Intent to Fine ("NIF") and Notice of Rights/Waiver ("NOR/W") forms challenged in this action to give notice of proceedings under section 274C of the Immigration and Nationality Act ("INA") or to obtain waivers of the right to a section 274C hearing.

2. Defendants are enjoined from issuing section 274C final orders against any alien who received the section 274C notice forms that the Court has found defective and who have in the past waived or failed to request, or do hereafter waive or fail to request, a hearing within sixty (60) days of receipt of the NIF, unless defendants recharge such a person with revised notice forms as required herein, or unless defendants demonstrate by a preponderance of the evidence in a hearing before an administrative law judge that such an individual received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective.

3. Defendants are enjoined from using section 274C notice forms that are not written in English and Spanish, or that do not simply and plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them.

4. Where defendants serve section 274C forms on a respondent on the same day that the respondent has or will be served with any form or advisal relating to deportation proceedings, defendants are enjoined from using any forms that do not simply and plainly communicate in English and Spanish the importance and separate nature of the section 274C proceedings.

5. The following provisions apply to the cases of individuals who received section 274C final orders

without a hearing based on the notice forms that the Court has found to be constitutionally deficient:

(a) Defendants shall identify all such individuals, and shall mail notice of their opportunity to apply to reopen their section 274C proceedings, and the potential consequences of such an application, to these individuals at their last known address. Defendants shall also mount a publicity campaign reasonably designed to afford notice to such individuals. Such a publicity campaign shall include, but not be limited to:

(i) issuance of a news release to every news organization in the United States and in Central and South America via the news wire;

(ii) distribution of the notice to the approximately 800 non-profit immigration assistance providers with whom the INS has established contact;

(iii) distribution of the notice to appropriate international organizations and community outreach networks; and

(iv) publication of the notice in the Federal Register.

(b) Such notice must be written in English and Spanish and must simply and plainly explain the Courts' ruling and the consequences of that ruling. It must simply and plainly communicate the opportunity for class members to file a motion to reopen their section 274C proceedings, and the potential opportunity for class members to reopen their deportation proceedings. The notice must provide a form class members may submit or follow to file a motion to reopen their section 274C proceedings. The form shall include, but not be limited to, a statement to which a class member may attest indicating that he or she did

not understand the procedure to request a civil document fraud hearing, or did not understand the nature and immigration consequences of the charges. The form may also require the alien to state that he or she will accept service and other communications relating to the section 274C proceedings by mail at the address listed on the motion to reopen, or at any updated address the individual may supply during the course of the proceedings.

(c) Defendants are enjoined from enforcing or taking any action in reliance on section 274C final orders issued without a hearing based on the notice forms that the Court has found to be constitutionally defective, or from deporting class members, until they first provide the notice required in sections (a) and (b) above, and 120 days elapses from the mailing of the notice, or initiation of the publicity campaign, whichever occurs last. Defendants may enforce or rely upon the section 274C final order if the respondent fails to move to reopen the section 274C proceedings within the specified 120 day period. When a motion to reopen is timely filed, defendants may not enforce or rely on the section 274C final order until the motion to reopen or any reopened proceedings are fully adjudicated.

(d) Section 274C proceedings in which the respondent was charged with the forms found to be defective by the Court and a final order has been issued shall be reopened if the respondent makes a timely application to reopen and declares therein that he or she did not understand the procedure to request a civil document fraud hearing, or did not understand the nature and immigration consequences of the charges, unless defendants demonstrate by a preponderance of the evidence in a hearing before an administrative law judge that the

individual received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective. A timely application may be filed between the date of this Order and the expiration of the 120 day period described in paragraph 5(b). Upon the reopening of any section 274C proceeding the defendants may reinitiate the charges against these individuals by using the revised notice forms and procedures required herein, and by serving those forms by mail if the INS has required the alien to state that he or she will accept service and other communications relating to the section 274C proceedings by mail at the address listed on the alien's motion to reopen, or by personal service of those forms on the alien.

(e) If defendants do not reinitiate charges within 30 days of the reopening of a section 274C proceeding, the section 274C final order must be vacated. If defendants do reinitiate the charges within 30 days of the reopening of a section 274C proceeding, the proceeding must thereafter be conducted in accordance with standard procedure as if the charges were being brought against the respondent for the first time.[4] At the conclusion of these proceedings the section 274C final order will either be affirmed or vacated.

(f) In cases where a section 274C order is vacated defendants must join in a motion by a class member to reopen deportation proceedings, where the deportation order was based on the section 274C final order, or where the class member seeks to apply for any relief from deportation that could have been available absent

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[4] Because plaintiffs raise no objection, defendants may choose to automatically schedule a hearing on the document fraud charges when an alien successfully moves to reopen his or her section 274C document fraud proceedings.

the existence of the defective section 274C final order. Defendants are enjoined from deporting a class member for a further 30 days following the vacating of the section 274C final order, to allow time for the submission of a motion to reopen deportation proceedings pursuant to this paragraph. If a joint motion to reopen the deportation proceedings is made, the proceeding shall be reopened and the respondent will be afforded the opportunity to request whatever relief is appropriate in light of the vacating of his or her section 274C final order. Any such reopened deportation proceeding shall be conducted in accordance with standard procedure as if the section 274C final order had never been entered.

(g) In any case where pursuant to this Order a class member is entitled to participate in a hearing relating to a motion to reopen a section 274C proceeding, a reopened section 274C proceeding, a motion to reopen a deportation proceeding, or reopened deportation proceeding, defendants are enjoined from refusing to parole or make alternative arrangements to allow class members outside the United States to return to the United States in order to attend such a hearing. This Order shall not be construed to require the government to pay for any travel or living expenses for any such person.

6. Defendants shall provide plaintiffs' counsel with the names, last known addresses and A-numbers of all class members identified pursuant to paragraph 5(a), and shall inform plaintiffs' counsel of all cases in which class members apply to reopen section 274C proceedings.

7. If any class member wishes to challenge a determination of an administrative law judge that he or she

received adequate notice as provided for in paragraphs 2 or 5(d) of this Permanent Injunction, or to challenge a determination of the INS that it will not join in a motion to reopen deportation proceedings under paragraph 5(f) of this Permanent Injunction, the class member may within 20 days of the determination move the Court to review it. Defendants must provide class members with notice of this right whenever such a determination is made.

8. Defendants must file any proposed form or notice required by this Permanent Injunction with the Court and plaintiffs' counsel at least thirty (30) days prior to the date defendants intend to use such form or notice. Plaintiffs may submit objections to the proposed forms within ten (10) days of the filing of a form or notice, and defendants may respond within five (5) days of the filing of any such objection. This monitoring procedure will remain in effect for one (1) year from the date of this Order, unless plaintiffs prior to the expiration of this period move for an extension of this monitoring period.

9. The provisions of this Permanent Injunction are effective immediately, except that the provisions of paragraphs 1, 3, and 4 shall be effective forty-five (45) days from the date of this Order. In addition, defendants must begin providing the notice required in paragraph 5, processing motions to reopen as required in paragraph 5, and providing the information required in paragraph 6 within ninety (90) days from the date of this Order.

III. CONCLUSION

The Clerk of the Court is directed to enter final judgment in favor of plaintiffs pursuant to the terms of this Order and Permanent Injunction.

SO ORDERED this 2nd day of October, 1996.

/s/ JOHN C. COUGHENOUR
JOHN C. COUGHENOUR
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C94-1204C

MARIA WALTERS, PLAINTIFFS

v.

JANET RENO, ET AL., DEFENDANTS

[Filed: Oct. 2, 1996]

JUDGMENT ON DECISION BY THE COURT

This action came on for consideration before the Court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff pursuant to the Order and Permanent Injunction filed October 2, 1996.

DATED this 2nd day of October. 1996.

/s/ Glenda Marshall
Deputy Clerk of Court

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C94-1204C

MARIA WALTERS, ET AL., PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed: Dec. 11, 1998]

ORDER ON MOTION TO AMEND AND MOTION FOR STAY

This matter comes before the Court on the motion of defendants to alter or amend the judgment in this action under Fed. R. Civ. P. 59(e), and to stay the permanent injunction in this case pending a decision on the Rule 59(e) motion and pending appeal. Having reviewed the pleadings, memoranda, exhibits and other documents on file, the court now finds and concludes as follows:

I. BACKGROUND

The Court on March 13, 1996 granted summary judgment in favor of plaintiffs. It ruled that defendants' standard procedures in document fraud cases under section 274C of the Immigration and Naturalization Act ("INA") violate due process by failing to inform class members of their rights and the immigration consequences of section 274C charges. The Court further ruled that plaintiffs were entitled to permanent injunctive relief. The Court on October 2, 1996 entered a judgment and a permanent injunction in favor of plaintiffs. Defendants now move to alter or amend the permanent injunction, and to stay implementation of the judgment and the permanent injunction.

II. ANALYSIS

A. Motion to Amend Judgment and Permanent Injunction.

The government asserts that the judgment and the permanent injunction should be amended based on the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, which was signed into law just days before the Court issued the permanent injunction in this case. It is appropriate to grant a Fed. R. Civ. P. 59(e) motion to amend a judgment when "there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah County v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2742 (1994). The government raises four separate issues.

1. Jurisdiction to Limit Deportation.

The permanent injunction prohibits the government from deporting class members until they have been notified of their opportunity to apply to reopen proceedings, and have had an opportunity to reopen and litigate such proceedings. The government claims that the IIRIRA removed the authority of the court to forestall the deportation of class members. It relies on IIRIRA § 306(a), which amended 8 U.S.C. § 1252 to say in relevant part:

> (g) EXCLUSIVE JURISDICTION—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Under the IIRIRA, deportation orders are now referred to as removal orders. Accordingly, the language in this section limits the Court's jurisdiction to review decisions and actions relating to deportation proceedings. This conclusion is also supported by the structure of the Act. Section 306(a) lays out the procedures aliens must follow to appeal deportation related INS decisions to the Court of Appeals. Thus the exclusive jurisdiction clause prohibits judicial review of decisions or actions taken by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders, except in the fashion specifically allowed for in section 306(a).

There are, however, serious questions as to whether the new exclusive jurisdiction provisions of the IIRIRA applies to the Court's permanent injunction. Whether this provision affects the permanent injunction depends on two questions: (1) whether plaintiff's claims arise from a decision or action regarding deportation proceedings, and (2) whether the IIRIRA exclusive jurisdiction provision is effective immediately, or is effective April 1, 1997.

a. Claims Arising from Decisions or Actions Concerning Deportation.

Plaintiffs persuasively argue that the exclusive jurisdiction provision of the IIRIRA does not impact this action because their claims do not "arise from" a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien . . ." IIRIRA § 306(a). Rather, their claims arise from the manner in which aliens are charged with section 274C document fraud. The injunctive relief granted by the Court collaterally impacts deportations only because the deportation of many class members could be based on invalid section 274C final orders. Accordingly, deportations that might be based on section 274C final orders are postponed under the injunction to ensure that no class members are deported because they were subjected to unconstitutional section 274C final orders. By ordering this relief the Court is not adjudicating claims arising from deportation proceedings or the execution of deportation orders, but is instead exercising its broad power to afford equitable relief. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) ("Once plaintiffs establish they are entitled to injunctive relief,

the district court has broad discretion in fashioning a remedy").

The government asserts, however, that plaintiffs' claims do actually arise from decisions or actions regarding the execution of deportations. They cite to plaintiffs' complaint, which pleaded to presence of irreparable harm by stating:

> Plaintiffs and the class they represent have no adequate remedy at law. They have suffered and continue to suffer irreparable injuries as a result of the acts of defendants complained of herein. Without immediate and injunctive relief, plaintiffs will be deported and excluded from the United States will be denied their right to live with their families, and will be unable to obtain the resident status in the United States which they may otherwise be entitled.

Plaintiffs' Complaint, ¶ 78. This paragraph, however, reinforces the notion that plaintiffs claims arise from the section 274C proceedings, but that the relief necessary to avoid additional injury requires the temporary postponement of the deportation of class members.

b. Effective Date of the IIRIRA.

The exclusive jurisdiction provision of the IIRIRA is also inapplicable to the Court's permanent injunction because it is not effective until April 1, 1997. Determining the effective date of the provision is unduly complicated. In general, the IIRIRA provisions regarding judicial review in section 306(a) are to "take effect on the first day of the first month beginning more

than 180 days after the date of the enactment of this Act." IIRIRA § 309(a). That is April 1, 1997. However, under IIRIRA § 309(c)(1), for those aliens who are participating in deportation proceedings before the effective date of April 1, 1997, the new provisions regarding judicial review do not apply. In contrast, under IIRIRA § 306(c)(1) the specific provision regarding exclusive jurisdiction "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the] Act."

Although the precise interaction between sections 309(a)-(c), and 306(c)(1) is somewhat unclear, the Court reads these sections together to mean that the IIRIRA provisions regarding judicial review are to apply effective April 1, 1997 to the claims of aliens who were not in pending deportation proceedings immediately before April 1, 1997, except that the exclusive jurisdiction provision of the IIRIRA will apply effective April 1, 1997 to the claims of all aliens regardless of whether those claims arise from past, pending or future deportation proceedings.

This means that the exclusive jurisdiction provisions relied on by the government in the present motion will be effective April 1, 1997, but will apply retroactively and prospectively to claims arising from deportation related decisions and actions. As a result, even if the new exclusive jurisdiction provision of the IIRIRA limited the Court's jurisdiction to issue a permanent injunction, that jurisdiction would not be limited until April 1, 1997.

In sum, the Court concludes that the new exclusive jurisdiction language of IIRIRA § 306(a) does not eliminate the jurisdiction of the court to issue the permanent injunction because plaintiffs' claims do not arise from a decision or action related to the initiation, conduct or execution of deportation proceedings. Moreover, even if the IIRIRA impacted the Court's injunction, that impact would not occur until April 1, 1997.

2. Jurisdiction for Court to Order the Return of Class Members.

The government argues that the IIRIRA deprived the Court of jurisdiction to order the INS to parole or make other arrangements to permit deported class members to reenter the country to attend hearings. The Court stated:

> In any case where pursuant to this Order a class member is entitled to participate in a hearing relating to a motion to reopen a section 274C proceeding, a reopened section 274C proceeding, a motion to reopen a deportation proceeding, or reopened deportation proceeding, defendants are enjoined from refusing to parole or make alternative arrangements to allow class members outside the United States to return to the United States in order to attend such a hearing.

Permanent Injunction, ¶ 5(g). The authority to do this was based on case law, and on 8 U.S.C. § 1182(d)(5), which permitted the INS to parole an alien into the United States "for emergent reasons or for reasons deemed strictly in the public interest."

The government argues that the Court should reconsider this ruling for two reasons. First, it argues that because IIRIRA § 306(a) prohibits the Court from interfering with the execution of deportation proceedings, the Court is also prohibited from ordering deported aliens to be paroled back into the country. Because section 306(a) does not apply to the Court's permanent injunction, however, this argument falls short.

Second, the government argues that the court should reconsider the parole requirement because the IIRIRA changed the statute that allowed the INS to parole aliens into the country. The new provision allows the Attorney General to parole aliens into the United States "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." IIRIRA § 602(a). This is not much different than the previous statutory provision. Both allow parol for the public benefit, which in this case is the correction of constitutional violations.

The Court's directive that the INS parole or make other arrangements for eligible class members to enter the country to attend hearings is not barred by the IIRIRA.

3. Translation of Charging Forms into Spanish.

The government asserts that the Court should reconsider its decision to require the INS to translate § 274C charging forms into Spanish. The Court required Spanish translation in part, because the INS translates into Spanish the Order to Show Cause ("OSC") that institutes deportation proceedings. The

OSC is often, but not always, served with the deficient Notice of Intent to Fine ("NIF") and Notice of Rights/Waiver ("NOR/W") forms that charge aliens with document fraud. The Court noted that service of the OSC in English and Spanish along with the NIF and NOR/W forms in English only, could leave aliens with the false impression that the document fraud charges were inconsequential. This, the Court concluded, added to the confusion caused by the forms used to charge aliens with section 274C document fraud. Summary Judgment Order at 29.

The government argues that the court should reconsider the translation requirement for the NIF and NOR/W because IIRIRA § 304 removes the statutory requirement that the OSC be translated into Spanish. It concludes that because an OSC initiating deportation proceedings need no longer be translated in Spanish, there will no longer be confusion if the section 274C charging and notice forms are also not translated into Spanish.

The Court's decision on summary judgment, however, required translation into Spanish for reasons other than problem caused when the INS serves a Spanish translated OSC with an English only NIF and NOR/W. The Court noted that "nearly all recipients of the NIF and NOR/W forms are non-citizens, and a substantial majority of them are native Spanish speakers." Summary Judgment Order at 25. It also noted that many do not understand or speak English and that as a group recipients of the forms are relatively uneducated. *Id.* at 26. Based on this the Court criticized the lack of translation of the NIF and NOR/W into Spanish. *Id.* This evidence, coupled with

the relatively slight burden of translating the forms into Spanish supports the conclusion that English only NIF or NOR/W forms do not sufficiently apprise class members of their rights.

4. Consequences of Section 274C Charges.

Finally, the government argues that the court should reconsider its conclusion that the NIF and NOR/W forms failed to apprise class members that a finding of document fraud would lead to a permanent and automatic deportation. The Court did find that an "alien who is the subject to a final order under § 274C is permanently excludable and deportable, subject to perhaps a few small exceptions." Summary Judgment Order at 2. The Court further noted that "[d]eportation is automatic unless the alien qualifies for one of several narrow exceptions, such as voluntary departure under § 1254(e). After deportation, there are few, if any, waivers to inadmissability available to the alien." *Id.* at 3.

The government contends that under the IIRIRA aliens subjected to final section 274C orders are no longer automatically deported and excluded. The IIRIRA does modify the law in this area. It explicitly permits the Attorney General to waive the inadmissibility and the deportation of an alien who has been subject to a section 274C final order, if the alien has not previously been fined under section 274C, and if the alien committed the offense "solely to assist, aid, or support the alien's spouse or child." IIRIRA § 345 (a) and (b).

Although this language makes explicit that deportation and inadmissibility may in certain, narrow circumstances, be waived, it does not change the Court's earlier conclusion that after a section 274C final order is entered deportation is automatic unless the alien qualifies for one of several narrow exceptions, and that there are few waivers to inadmissibility. Because the results of a section 274C final order are still severe, the government must still provide new charging and notice forms that are written in English and Spanish, and "simply and plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them." Permanent Injunction, ¶ 3.

B. **Motion to Stay Enforcement of Permanent Injunction.**

The government moves to stay the permanent injunction pending the Court's resolution of its motion to alter or amend the judgment, and during appeal. On November 27, 1996 the Court issued a minute order that stayed "the requirement that defendants file with the Court a proposed form of the notice that must be provided to class members to apprise them of their opportunity to move to reopen their section 274C proceedings." That necessarily stayed those elements of the permanent injunction that are triggered by or dependant on approval of the form of notice. This Order terminates that temporary stay.

The question remains whether any elements of the permanent injunction should be stayed pending appeal. Although the request for a stay pending appeal may be premature because the government has not yet appealed, the Court will addressed this fully briefed issue.

The standard for staying an injunction pending appeal is similar to that for granted a permanent injunction. *Lopez v. Heckler*, 713 F.2d 1532, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). There are two interrelated tests that represent the outer reaches of a single continuum. *Id.* The moving party must show a probability of success on the merits and the possibility of irreparable injury, or demonstrate serious questions going to the merits and that the balance of hardships tips sharply in its favor. *Id.*

The government argues that it has a strong possibility of success on the merits. It raises arguments regarding the granting of summary judgment, the terms of the permanent injunction, and the impact of the IIRIRA. Its arguments have been addressed by the Court and do not raise a strong possibility of success on appeal. It is fair to say, however, that because of the complexity of the issues in this case and the impact of new, previously uninterpreted statutes, the government raises significant questions going to the merits. Thus it must show that the balance of hardships tips in its favor.

The injunction can be broken down into three elements: (1) the requirement that the INS stop using the deficient section 274C document fraud charging forms and start using new forms; (2) the requirement that the INS provide notice of and a procedure for aliens to reopen section 274C proceedings and in some cases deportation proceedings, and the requirement that the INS allow aliens to be paroled back into the country to attend reopened proceedings, and (3) the requirement

that the INS stay the deportation of class members until they have completed the reopening process.

The balance of hardships in this case is similar to that in *Lopez*. There, the government sought a stay during appeal of a preliminary injunction that required it to reinstate social security disability benefits to class members pending the readjudication of their claims. *Lopez*, 713 F.2d at 1436. The government estimated that the monthly cost of reinstating benefits would be $12 million and the monthly cost of administering the injunction would be $10.3 million. *Id.* The Court concluded that these costs did not outweigh the physical and emotional suffering shown by plaintiffs who were denied basic benefits and there by deprived of life's necessities. *Id.* at 1437.

In similar fashion, the costs to the government in implementing the new charging procedures and in staying the deportation of class members do not outweigh the harm that affected aliens will suffer if these aspects of the permanent injunction are stayed pending appeal. If the Court stayed these requirements, the class members would suffer the following harms: First, aliens would continue to be charged with document fraud with the forms that the Court has found to be constitutionally deficient. Second, aliens who have in the past been charged with document fraud and who are in the future charged with document fraud would continue to be prosecuted and would be subjected to final section 274C orders, all on the basis of the deficient forms. Third, aliens who are subjected to final section 274C orders based on the deficient forms would be subject to deportation. The Court will not, however, permit aliens to be unconstitutionally charged, pro-

secuted and deported for document fraud during the pendency of appeal. Indeed, when the deprivation of a constitutional right is at issue irreparable injury may be presumed. *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992).

The same analysis, however, does not hold true for the provisions of the preliminary injunction that require the government to give notice of and provide procedures for aliens to reopen their document fraud proceedings and affected deportation proceedings, and that require the government to parole or make other arrangements for aliens to reenter the country to attend reopened proceedings.[1] These procedures represent the most burdensome aspects of the permanent injunction, and can be stayed without causing serious harm to class members who will have an opportunity to apply to reopen their section 274C and document fraud proceedings upon the completion of the government's appeal.

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[1] The Court also notes that the government misinterprets the requirement for issuing news releases. It says the injunction may require it to contact individual news organizations in Central and South America. But the injunction actually requires the government to issue news releases via the news wires to news organizations in the United States and Central and South America. Permanent Injunction, ¶ 5(a). Thus it need not contact individual news organizations. It need only use the news wire services that reach those geographic areas. If that is not reasonably possible, the government may petition the court for relief from that particular provision.

For class members who have been subjected to section 274C final orders, a stay of the reopening procedures will maintain the status quo. For those who are still in the United States, the prohibition against deportation in the permanent injunction will keep them here. For those who have already been deported, their status will remain unchanged and they will eventually have an opportunity to apply to reopen their proceedings. The Court will accordingly stay enforcement of the reopening provisions in the permanent injunction.

C. **Modification of Permanent Injunction**.

Finally, in considering the government's motion for a stay the Court has concluded that the limitation on the deportation of class members is too broad. The purpose of the limitation is to prevent the INS from deporting any aliens on the basis of a faulty section 274C final order, or from denying any form of relief from deportation based on such an order. The INS should not, however, be prohibited from deporting an alien on other grounds just because the alien is also subject to a section 274C final order. For example, the INS should be able to deport a class member who has been convicted of a felony so long as the alien could not be eligible for relief from deportation absent the presence of a section 274C final order. The Court will thus modify the permanent injunction to allow the INS to deport aliens on other grounds so long as the deportation is not in any way affected by a section 274C final order.

D. Terms of Stay and Modification of Permanent Injunction.

1. Terms of Stay.

The Court will stay the provisions of the permanent injunction that require the government to give notice of and provide procedures for aliens to reopen their document fraud proceedings and affected deportation proceedings, and that require the government to parole or make other arrangements for aliens to reenter the country to attend document fraud proceedings. This stay will affect a number of the provisions in the permanent injunction.

The Court will stay paragraphs (5)(a), 5(b), 5(d), 5(e), 5(f), 5(g), and 6. By not staying paragraph 5(c), the Court intends to maintain the prohibition against the deportation of class members until such time as the reopening procedures are initiated. When that occurs, all the provisions of the permanent injunction will again be in force.

The Court notes that paragraph 2 is not stayed. Thus, pursuant to the terms of that paragraph the government must still recharge certain aliens who were charged with the deficient section 274C notice forms but have not yet been subjected to a section 274C final order.

This stay is effective as of the date of this Order, but will be dissolved if the government does not timely appeal. The provisions not stayed by the Court are effective as of the dates identified in paragraph 9 of the permanent injunction.

2. **Modification of Permanent Injunction.**

Paragraphs 5(c) and 5(f) of the permanent injunction enjoin defendants from "deporting class members" and from "deporting a class member" for certain specified times. The prohibition against deporting class members is hereby modified to prohibit defendants for the times specified in the permanent injunction from deporting a class member in reliance on a section 274C final order issued without a hearing based on the notice forms that the Court has found to be constitutionally defective, or from deporting a class member who could qualify for relief from deportation absent the existence of a defective section 274C final order.

III. CONCLUSION

The government's motion to alter or amend the judgment is DENIED. The government's motion to stay the judgment is PARTIALLY GRANTED pursuant to the terms of this Order.

SO ORDERED this 11th day of December 1996.

/s/ JOHN C. COUGHENOUR
JOHN C. COUGHENOUR
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36304

DC No. C94-1204C

MARIA WALTERS; WILLIAM WALTERS; CESAR CORONA-ALVAREZ; ANTONIO ALVAREZ; NINFA DE ADAMES, GUADALUPE ADAMES, HUSBAND AND WIFE; CAMILA GARCIA-CRUZ; OMAR KAYYAM MEZIAB, LESLIE MEZIAB, HUSBAND AND WIFE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DORIS M. MEISSNER, COMMISSIONER OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

[Filed: Aug. 5, 1996]

ORDER

Before: GOODWIN and REINHARDT, Circuit Judges, KING, Senior District Judge.*

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

1. Section 1252 of Title 8, United States Code (Supp. II 1996), provides:

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

their date of commission, otherwise covered by section 1227(a)(2) (A)(i) of this title.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a

separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this chapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of t his title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

2. Section 1324c of Title 8, United States Code (1994 & Supp. II 1996), provides:

§ 1324c. Penalties for document fraud

(a) Activities prohibited

It is unlawful for any person or entity knowingly—

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person

other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title or obtaining a benefit under this chapter, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6)(A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

* * * * *

(b) Exception

This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of title 18.

(c) Construction

Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18.

(d) Enforcement

(1) Authority in investigations

In conducting investigations and hearings under this subsection—

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing

(A) In general

Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a) of this section, the Attorney General shall provide the

person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and desist order with civil money penalty

With respect to a violation of subsection (a) of this section, the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(A) not less than $250 and not more than $2,000 for each document that is the subject of a violation under subsection (a) of this section, or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $2,000 and not more than $5,000 for each document that is the subject of a violation under subsection (a) of this section.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection.

(5) Judicial review

A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(6) Enforcement of orders

If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(7) Waiver by Attorney General

The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly violates subsection (a)(6) of this section if the alien is granted asylum under section 1158 of this title or withholding of removal under section 1231(b)(3) of this title.

(e) Criminal penalties for failure to disclose role as document preparer

(1) Whoever, in any matter within the jurisdiction of the Service, knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application which was falsely made (as defined in subsection (f) of this section) for immigration benefits, shall be fined in accordance with title 18, imprisoned for not more than 5 years, or both, and prohibited from preparing or assisting in preparing,

whether or not for a fee or other remuneration, any other such application.

(2) Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits pursuant to this chapter, or the regulations promulgated thereunder, whether or not for a fee or other remuneration and regardless of whether in any matter within the jurisdiction of the Service, shall be fined in accordance with title 18, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.

(f) Falsely make

For purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.